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{SHOW } PROCEEDINGS AND ORDERS DATE: 0129

CASE NBR 84-1-00336 CFX
SHORT TITLE Bushey, James, et al. DOCKETED: Aug 30 1984
VERSUS NY St. Civ. Serv., et al.

Date	Proceedings and Orders
Jul 2 1984	Application for extension of time to file petition and order granting same until August 30, 1984 (Marshall, July 2, 1984).
Aug 30 1984	Petition for writ of certiorari filed.
Sep 19 1984	Order extending time to file response to petition until October 30, 1984.
Sep 28 1984	Brief of respondents Gerald Wells, et al. in opposition filed.
Nov 5 1984	Brief of respondent NY State Civil Service Commn. in opposition filed.
Nov 7 1984	DISTRIBUTED. November 21, 1984
Nov 26 1984	REDISTRIBUTED. November 30, 1984
Dec 3 1984	REDISTRIBUTED. December 7, 1984
Dec 10 1984	REDISTRIBUTED. January 4, 1985
Jan 7 1985	Petition DENIED. Dissenting opinion by Justice

CONTINUE {

PROCEEDINGS AND ORDERS DATE: 0129

CASE NBR 84-1-00336 CFX
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Date	Proceedings and Orders
Jan 7 1985	Petition DENIED. Dissenting opinion by Justice Rehnquist, with whom The Chief Justice and Justice Whi join. (Detached opirion.)

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No.

Office-Supreme Court, U.S.
FILED
AUG 30 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1984

JAMES BUSHEY, *et al.*,

Petitioners,

v.

NEW YORK STATE CIVIL SERVICE COMMISSION, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Dated: August 30, 1984

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14 pp

Question Presented.

1) Whether, consistent with the Fourteenth Amendment to the United States Constitution and/or Title VII of the Civil Rights Act of 1964 as amended, a State may unilaterally, voluntarily alter the scores of a professionally developed, job-related Civil Service promotional examination to prefer minority candidates solely on the basis of race and national origin absent litigation, Court order, consent decree, settlement or applicable collective bargainning agreement, in order to grant a benefit and privilege to individuals who are not identifiable victims of past or present discrimination and thereby prevent or delay the promotion of successful White candidates.

Parties.

In addition to James Bushey whose name appears in the caption, petitioners include: Roger D. Bell, Robert W. Ferber, William J. Norton, Robert J. Seitz, George Bartlett, Charles Page, Wayne Wilhelm, Wayne L. Strack, Robert Fucci, Gary H. Filion, Edward D. Rogan, Miles Barnes, Donald E. Clark and Gerald Sweeney.

In addition to the respondent named in the caption, respondents include: Joseph Valenti, in his capacity as President of the New York State Civil Service Commission and Civil Service Commissioner; Josephine Gambino and James McFarland, in their capacity as Civil Service Commissioner; The New York State Department of Correctional Services; and Thomas A. Coughlin, III, in his capacity as Commissioner of the New York State Department of Correction Services, each of whom was a named defendant below. Additional respondents include, Gerald A. Wells, Wilbur I. Wright, Joseph P. Bates, Thomas D. Haskell and Percy Jones who were named intervenors below.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984.

JAMES BUSHEY, *et al.*,

Petitioners,

v.

NEW YORK STATE CIVIL SERVICE COMMISSION, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Opinions Below.

The April 16, 1984 opinion of the Court of Appeals is reported at 733 F2d 220 and is appended hereto as Appendix "A."

The October 3, 1983 opinion and order of the District Court is reported at 571 F. Supp. 1562 and is appended hereto as Appendix "B."

The October 4, 1983 judgment of the District Court is appended hereto as Appendix "C."

Jurisdiction.

The Court of Appeals entered judgment on April 16, 1984. By order of the Hon. Thurgood Marshall, Associate Justice of the Supreme Court of the United States, dated July 2, 1984, petitioners time to file a petition for Writ of Certiorari was extended to and including August 30, 1984. Jurisdiction is conferred on this Court by 28 USC §1254(1).

Constitutional Provisions, Acts, Statutes and Rules and Regulations Involved.

United States Constitution, Fifth and Fourteenth Amendments; 42 U.S.C. §§2000e-2(a), 2000e-2(h) and 2000-2(j); New York State Constitution Article V, §6; New York Civil Service Law §§52, 61 and 85; New York Civil Service Rules and Regulations, 4 NYCRR §§3.6, 4.2(a), 66.2, 67.1 and 67.2. These are set out *seriatim* in Appendix D.

Facts.

Petitioners, White employees of the State of New York Department of Correctional Services, seek promotion to the position of Correction Captain, a position within the classified Civil Service of the State of New York.

The New York State Constitution Article V, §6 (4d)[1] requires that promotions within the Civil Service of the State be made on the basis of merit and fitness as determined by competitive examination. See also: N.Y. Civ. Serv. L. §52(2). (5d) Pursuant to that broad mandate, respondent New York State Civil Service Commission is charged by law with the duty to develop and administer competitive

[1]Unless otherwise indicated, numbers and letters in parentheses refer to pages in the appendix.

examinations for promotion within the Civil Service of the State and did so in this case. Unlike many of the cases alleging racial discrimination in the hiring and promotion of public employees, this case does not involve the question of whether the test administered was discriminatory. The focus of this case is, instead, upon the scoring of the test.

The test was administered on January 30, 1982. Under New York Law, promotions within the State Civil Service are made from the top three candidates on a rank-ordered eligible list. See: N.Y. Civ. Serv. L. §61 (9d) and 4 NYCRR §4.2(a). (17d) The eligible list is constructed using test scores combined with earned seniority and veterans credits to give a "final rating." See: New York State Constitution Art. V, §6 (4d); N.Y. Civ. Serv. L. §85 (10-15d) and 4 NYCRR §67.2 (24d). The candidates are ranked on the eligible list in the order of their final rating. See: 4 NYCRR §3.6 (16d). Candidates must pass the test in order to be given an opportunity to increase their final rating by the addition of seniority and veterans credits. See: N.Y. Civ. Serv. L. §52(8) (7d) and 4 NYCRR §§66.2 (19d) and 67.2 (24d). After the seniority and veterans credits are added to the test scores, an eligible list is promulgated and published.

After the test was administered and without prior notice to any of the candidates or legal compulsion of any nature, the State abandoned the statutorily mandated scoring procedures and constructed and implemented two separate scoring systems to score the test—one for Black and Hispanic candidates and one for all other candidates. Throughout the range of possible raw scores (total correct answers), Black and Hispanic candidates with a particular raw score were given an eventual test score that was higher than the eventual test score given to other candidates who earned the identical raw score.

The State respondents' secretive and unilateral decision to alter test scores based on race and national origin was made voluntarily absent any litigation, settlement agreement, court order, collective bargaining agreement, announced affirmative action plan or other mandate. In short, the scoring plan was implemeted without the examination of an adversary in the context of litigation or collective bargaining, the tempering influence of a reviewing judge in the context of a consent decree or a Court approved settlement, or the public scrutiny of a carefully crafted, publicly announced affirmative action plan.

On September 9, 1982 the eligible list was published. It was not until certain of the petitioners reviewed their tests that it was learned that the State had unilaterally adjusted scores solely on the basis of race and national origin. On November 2, 1982 petitioners commenced this action alleging, in part, that the State's acts discriminated against them in violation of the Fourteenth Amendment to the United States Constitution, and Title VII of the Civil Rights Act of 1964, as amended, 42 USC §§2000(e), *et seq.*

The State respondents answered, specifically admitting that a "professionally developed, job-related ability test designated as Examination No. 37-526 was carefully and lawfully prepared and administered for the position of Correction Captain so as to test the merit and fitness of candidates for that position." The State also admitted that they used two separate scoring systems, one for Black and Hispanic candidates and one for all others.

After the State answered, a group of Black candidates intervened. These respondents ("intervenors" herein) sided with the State respondents and urged approval of the racially adjusted test scores and eligible list.

The State decided to adjust the scores *after* the examination was given allegedly to correct what the State perceived was the adverse *racial* impact of the test.

The candidate pool had the following test results:

	Candidates	*Passed Without Adjustment*	*% Pass Rate*
White	243	119	49%
Black	28	6	21%
Hispanic	4	2	50%
TOTAL	275	127	46%

The scoring adjustment used by the State had the effect of raising the relative eligible list ranking of *all* Black and Hispanic candidates. The highest Black or Hispanic test score was administratively increased so that it became the highest test score of any candidate, with the other Black and Hispanic candidates receiving similar preferences. The adjustments also guaranteed an equal pass rate for all minority and non-minority candidates by administratively doubling the number of minority candidates who were given passing scores. After the adjustments were made, a total of 16 out of 32 Black and Hispanic candidates were awarded passing scores.

The adjustments increased the scores of Hispanic candidates even though the Hispanic candidates had the highest pass rate of any subgroup of candidates taking the examination. One of the effects of the State's score adjustment was that some Black and Hispanic candidates who failed the examination were given passing scores while

similarly situated White candidates, with identical raw scores, were given failing grades. The tests are scored on the basis of 100 points, typically, with a common percentage basis, i.e. 85 correct answers on a test with 100 questions equals a test score of 85 percent. 4 NYCRR §67.1(a). (20d) In this case there were a total of 103 questions. A passing score was set at 70 percent, which for all candidates who were not Black or Hispanic required 72 correct answers. ($72 \div 103 = 69.9\% = 70\%$) This uniform standard was applied to all but Black and Hispanic candidates. Members of the preferred groups who received a raw score between 67 and 71 were given adjusted test scores ranging from 70.9 to 75.9 and were deemed to have passed. Thus, Black and Hispanic applicants who received raw scores between 67 and 71, scores which were *not* passing scores, were given adjusted passing scores and then allowed to apply their seniority and veterans credits, further increasing their final rating, while other candidates who earned the same raw scores were excluded from the eligible list and deprived of the opportunity to apply these same veteran's and seniority credits.

The minority candidates whose failing test scores were unilaterally converted to passing scores were not simply added to the bottom of the eligible list. Because of the method used, all of the minority candidates whose failing scores were administratively converted to passing grades were ranked above other White candidates who passed the examination without any adjustment.[2]

After preliminary discovery was completed, all parties moved for summary judgment. In support of their motion, petitioners submitted affidavits from an industrial

[2]The number of White candidates bumped by the administrative award of passing grades ranged from a high of 56 candidates bumped by one beneficiary of the racial bonus to a low of eight candidates bumped by another beneficiary of the racial bonus whose score was administratively converted from a failing to a passing score. Some white candidates were bumped by more than one beneficiary of the racial bonuses.

psychologist which revealed that the State respondents' methodology used in the analysis and scoring of the test was not in keeping with currently accepted professional standards, practices and research findings.

Neither the State nor the intervenors introduced proof which contradicted or contravened the findings and conclusions of petitioners' expert. Both relied solely on the purported justification for the racial adjustments announced by the State.[3] The State introduced no evidence whatsoever which demonstrated that any consideration was given to the possibility of rebutting a claim of a prima facie case. However, the State did attempt to justify its unilateral and voluntary adjustment by noting that it would be expensive to defend the test as job related.

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[3]The State listed the following factors as evidence which reinforced its perception of adverse impact:

> [t]he basis for the decision to use differential scoring was the adverse impact of the written test, the litigation history of examinations for Corrections supervisory security titles, the lack of any empirical data indicating that minority and non-minority candidates for Captain would not perform equally well on the job, and the availability of data regarding the performance of minorities and non-minorities in the two supervisory titles directly below Correction Captain.

The breakdown of test results is outlined in the facts. The prior litigation history for Corrections supervisory security titles involved Correction Sergeants and Correction Lieutenants, different jobs with different duties, not Correction Captains as in this case, See: *Kirkland v. New York State Department of Correctional Services, ("Kirkland Sergeants"),* 374 F. Supp. 1361 (S.D.N.Y., 1974), aff'd in part and rev'd in part, 520 F.2d 420 (2d Cir., 1975), cert. denied, 429 U.S. 823, (1976), on remand, 482 F. Supp. 1179 (S.D.N.Y.), aff'd, 628 F.2d 796 (2d Cir., 1980), cert. denied, 450 U.S. 980 (1981); *Kirkland v. New York State Department of Correctional Services, ("Kirkland Lieutenants"),* 552 F. Supp. 667 (S.D.N.Y., 1982), aff'd, 711 F.2d 1117 (2d Cir., 1983), cert. denied, ____ U.S. ____, 104 S. Ct. 997, (1984).

(Footnote continued on next page.)

Neither the State nor the intervenors attempted to withdraw or depart from the earlier admission that the test, standing by itself, was a professionally developed, job-related, competitive ability test measuring merit and fitness. No one challenged the raw scores of the test and no one suggested that the test was anything other than a valid, job-related examination. In fact, the State respondents refused to disclose the test itself to the petitioners saying it was not material or relevant.

Essentially, the State urged the District Court to extend the "settlement theory" enunciated in *Kirkland v. New York State Dept. of Corr. Services,* 711 F2d 1117 (2d Cir.

(Footnote continued.)

The District Court held that the fact that prior tests have been the subject of litigation proves nothing about the instant test (45b). A careful reading of the decisions in the prior litigation reveals the Courts have specifically approved the methods used to make all of the permanent appointments for Correction Sergeant and Correction Lieutenant since 1972. If anything the prior litigation demonstrates that the candidate pool for the 1982 Correction Captain test had been promoted pursuant to procedures which were specifically reviewed and approved by earlier Courts.

The State explained the third factor, the lack of empirical data comparing job performance of minority and non-minority candidates, as the lack of any current, permanent Black or Hispanic Correction Captains. This ignores that there are currently only 13 Correction Captain positions filled with permanent appointments.There are three times as many provisional Correction Captains including many Black and Hispanic candidates. The lack of permanent appointments are due to the State respondents' refusal to administer an examination despite the exhaustion of the most recent eligible list in 1978. Since that date, all appointments have been provisional appointments. In fact, the State refused to administer an examination until ordered to do so by the Court. See *Edgerton, et al. v. New York State Civil Service Comm., et al.,* 84 AD 2d 881 (3rd Dept., 1981). Of course, the lack of empirical data is just that, the lack of any evidence either positive or negative and thus proves nothing.

Petitioners' uncontroverted expert was particularly critical of the final factor, the use of performance data for different jobs with different duties including different individuals to evaluate the Correction Captain's test. Essentially, as the Second Circuit itself recognized, the State's decision to adjust scores was in reality based solely on the test results standing alone.

1983) cert denied ____ U.S. ____, 104 S. Ct. 997 (1984) ("Kirkland Lieutenants") which respondents argued permits a state to agree to a Court approved settlement of ongoing litigation which imposes race-conscious remedies upon a showing of a prima facie case by statistics without admitting to a violation of Title VII. The State ignored the fact that the Court of Appeals in *Kirkland Lieutenants, supra,* 711 F2d at 1131, held that the State's willingness to settle contested litigation constituted an admission of a violation of Title VII. Under the State's theory, it should be allowed to secretly and unilaterally impose race conscious remedies outside the context of litigation in those instances where the State perceives that a particular group could make a prima facie claim of discrimination even though there was no showing of actual racial discrimination and even though the State made no showing that it considered or discussed the probability of successfully rebutting the prima facie claim of discrimination.

The District Court rejected the State's theory and granted the petitioners' motion for summary judgment holding that the respondent State had discriminated against non-minority candidates in violation of Title VII of the Civil Rights Act of 1964, 42 USC §§2000e-*et seq.*

The District Court established the framework for its analysis by stating that "[i]t is well established that when an affirmative action settlement contains race-conscious relief affecting third parties, some well-substantiated claim of racial discrimination against the plaintiff class is necessary to ensure that new forms of invidious discrimination are not approved in the guise of [race conscious remedies . . .]" (36b) The District Court held that in this case, where the State acted unilaterally outside of the context of litigation, in order to demonstrate that there was a "well-substantiated claim" of racial discrimination,

the State had the burden of demonstrating not only that there was a prima facie case of adverse racial discrimination, but also that the State considered the possibility of rebutting the prima facie case.

The District Court held that the State had failed to establish a prima facie case of adverse racial discrimination. (36-57b) The District Court also held that even if the prima facie claim had been established, the State erroneously failed to consider the possibility of rebuttal. (57-64b) Finally, the District Court held that the methodology employed by the State to remedy the perceived problems was, itself, fundamentally flawed. (64-75b)

Both the State defendants and the Intervenors appealed from the decision, order and judgment, and on appeal, the Second Circuit Court of Appeals reversed the District Court and remanded the proceedings to the District Court with the instruction that trial would be limited to an inquiry of whether the State's scoring methodology unnecessarily trammelled the rights of White candidates. The Court of Appeals specifically rejected the District Court s analysis that the State could not simply rely on disparate results without more to justify the imposition of racial preferences and, in effect, endorsed the State's unilateral and voluntary grant of a racial preference. The Court of Appeals decision stated:

> In short, we hold that consistent with *Kirkland Lieutenants,* 711 F. 2d at 1130, and *Weber,* 443 U.S. at 209, 99 S.Ct. at 2730, a showing of a prima facie case of employment discrimination through a statistical demonstration of disproportionate racial impact constitutes a sufficiently serious claim of discrimination to serve as a predicate for employer-initiated, voluntary race-conscious remedies. (16-17a)

Essentially the Court of Appeals held that a public employer may unilaterally alter test scores to add a racial preference based solely on a statistical showing of racial imbalance even though the employer admitted that the test was a professionally developed, job-related, competitive ability test and no one challenged the examination itself as discriminatory. Under the Court of Appeals' decision, not only is the State free to disregard the statutorily mandated selection method based solely on the State's perception that a prima facie claim could be made out, the State need not even consider, much less demonstrate, whether the prima facie case could be rebutted by showing that differences were due to job-related factors and not race. Essentially the Court of Appeals approved the concept of a State imposed quota guaranteeing equal results for all groups.

In reaching its decision the Court of Appeals relied principally on an extension of the "settlement theory" endorsed in *Kirkland Lieutenants*, 711 F 2d 1117 (2d Cir., 1983) citing *Carson v. American Brands, Inc.*, 450 US 79, 88 n. 14, (1981); and *Alexander v. Gardner-Denver Co.*, 415 US 36, 44 (1974). (13-14a). Of course this ignores the fact that the State's acts were not taken in the context of a settlement decree. Most importantly, by approving the concept of unilateral race conscious adjustments in this case, the Court of Appeals ignored that the State respondents admitted that the test itself was a professionally developed, job-related, competitive ability test which, at least under these facts, insulated the State from a finding that the test discriminated on the basis of race. See: 42 USC §2000e-2(h).

The Court of Appeals rejected petitioner's argument that the insulation provided by 42 USC §2000e-2(h) pro-

tected not only employers but also protected innocent third parties—the petitioners herein. The petitioners argued that the refusal of the State to raise 42 USC §2000e-2(h) as a defense does not preclude petitioners from demonstrating that the test was a valid job-related examination and that disparate results were not due to discrimination, but rather, legitimate job-related factors.

The Court of Appeals' decision has the effect of endorsing the grant of a race-conscious relief for minority candidates without any showing that the beneficiaries are identifiable victims of past or present discrimination, and without any showing of appropriate judicial, administrative or legislative findings of constitutional or statutory violations.

REASONS FOR GRANTING THE WRIT.

I. This case is important as the Court of Appeals has allowed State officials to unilaterally and voluntarily establish a racial classification depriving innocent White career employees of a promotional opportunity earned by successful completion of a professionally developed, job-related, ability test upon the perception of a potential *claim* of discrimination based entirely on disproportionate test results.

The Court of Appeals has decided important questions of federal statutory and constitutional law which have not been, but should be, decided by this Court. In the process, the Court below has erroneously applied the decisions of this Court, and specifically relied on principles which this Court has held are inapplicable in a recent decision issued after the Court below rendered its decision.

The questions concern the legality of a public employer's unilateral and voluntary grant of racial preferences for promotional opportunities based solely upon State administrators' perceptions of a potential prima facie claim of disproportionate impact and the rights of public employees whose individual rights are being affected thereby. These questions are important not only because of the vast number of public employees whose individual rights are being affected thereby, but also because they call for definition of the line between permissible and impermissible State action granting racial preferences under the equal protection clause of the United States Constitution and Title VII.

In reaching its decision, the Court of Appeals relied principally on an extension of the "settlement theory" of Title VII, citing its own decision in *Kirkland Lieutenants,* 711 F2d 1117 (2d Cir., 1983) cert. den. ____ US ____, 104 S. Ct. 997 (1984) (14-17a). The Court of Appeals reasoned that since the "settlement theory" which it adopted in *Kirkland Lieutenants,* permitted a public employer to settle ongoing litigation even though the settlement included race-conscious relief, that same public employer should be permitted to prospectively grant racial preferences in an attempt to avoid litigation from minority candidates so long as the employer perceives that it might be sued by a group claiming racial discrimination evidenced solely by disproportionate test results.

However, as this Court recently noted in *Firefighters v. Stotts,* ____ US ____, 81 L. Ed. 2d 483, 498 (1984) ("Stotts") "[t]he settlement theory, whatever its merits might otherwise be, has no application when there is no "settlement" with respect to the disputed issue." In this case, just as in "Stotts," there was no settlement. The State's acts were unilaterally imposed outside of the context of any litigation, Court approved settlement or lawful affirmative action plan.

The Court of Appeals' analysis also ignores the effect of the State respondents' specific admissions, that the test was a "professionally developed, job-related, ability test . . ." The fact that the test had these characteristics precluded any finding that the test discriminated on the basis of race in violation of Title VII. See 42 USC §2000e-2(h). The State cannot unilaterally disregard this statutory provision so as to favor minority test takers, some of whom failed the test, to the detriment of petitioners who passed the examination. That admission of discrimination which forms the underpinnings for the settlement theory in *Kirkland Lieutenants,* 711 F2d at 1311, is totally absent in this case.

The Court of Appeals also relied on *United Steelworkers v. Weber,* 443 US 193 (1979) ("Weber") to support its reversal of the District Court. The Court of Appeals reasoned that *Weber* should be extended to permit a public employer to unilaterally grant racial preferences, not as part of a carefully crafted affirmative action plan, but rather as a private and unreviewed action by middle level bureaucrats based on nothing more than statistical disparity and fear of a minority claim of discrimination. However, the Court of Appeals misconstrued and misapplied the principles enunciated in *Weber.* Unlike *Weber,* in this case, there is no collectively bargained agreement to provide racial preferences "to eliminate manifest racial imbalances in traditionally segregated job categories." Nor does this case involve the acts of a private employer and the exclusive bargaining representative for its employees. See *Weber, supra,* 443 US at 197. The adversarial review and scrutiny provided by collective bargaining which was present in *Weber* is wholly absent in this case where the State unilaterally and secretively adjusted scores. Not only is there no collectively bargained agreement in this case, there have been absolutely no findings of

prior discrimination or findings that the Correction Captain position is a "traditionally segregated job category."[4]

The decision below is also in conflict with other decisions of this Court in that, it approves the unilateral act of a public employer to prefer one racial group over another in promotions in the State's civil service without requiring any inquiry, proof or adjudication in any legislative, administrative or judicial forum of the existence of a constitutional or statutory violation. Instead, the Court's approval rests upon a state administrator's *claim* that a *prima facie* case of employment discrimination through a statistical demonstration of disproportionate racial impact could be made out. The Court held that a state did not have any obligation to look beyond the mere claim to consider rebuttal proof and prohibited petitioners from demonstrating that the prima facie claim could be rebutted.

Ignored was this Court's holdings in *Furnco Construction Corp. v. Waters,* 438 US 567, 579 (1978) that a "prima facie" showing is not the equivalent of a factual finding of discrimination . . .," and that this Court has "never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of

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[4]The contrary suggestion of the Court of Appeals ignores the record in this case. While it is true that there are currently no permanent Black or Hispanic Captains in the Department of Correctional Services, there are numerous provisional Black and Hispanic captains. See note 2. Critically, there have been absolutely no findings that the State discriminated in any way on this examination or in any previous examination for Correction Captain positions. In fact, in *Kirkland Lieutenants,* 711 F2d 1117 (2nd Cir., 1983), cert den. ____ US ____ 104 S. Ct. 997 (1984) the Court of Appeals affirmed the District Court's approval of a settlement agreement that contained specific disclaimers of present or past discrimination. See also: *Kirkland Sergeants,* 520 F2d 420, 428 (2nd Cir., 1975), cert. den. 429 US 824 (1976).

judicial, legislative or administrative findings of constitutional or statutory violations." (Citations omitted.) *Regents of the University of California v. Bakke, ("Bakke"),* 438 US 265, 307 (1978). There has been no finding by an "appropriate governmental authority . . . that such a violation has occurred." *Fullilove v. Klutznick,* 448 US 448, 498 (1980) (Powell, Jr., concurring). On the facts herein the State does not have a compelling interest in creating a race-conscious remedy and no proof of discrimination has been offered. To the contrary, the State's admission that the test was a professionally developed, job-related competitive ability test negates the existence of any legal basis for a race-concious remedy. See 42 USC §2000-e 2(h). The Court of Appeals has approved an unlawful racial preference, not permissible remedial State action. The State's action is blatant reverse discrimination designed to guarantee equality of results not equality of opportunity. See generally, *Bakke, supra,* 438 US at 306-10 (1978).[5]

Under the decision below, a state may grant a racial preference in promotion to minority test takers, and displace whites with higher test scores, without any showing of unlawful discrimination. The Court of Appeals sheltered the State's action by prohibiting those prejudiced by the unilateral racial adjustments from effectively

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[5]The grant of a racial preference is not only inconsistent with the admission that the test is job related and the lack of proof of actual discrimination, but also, such an admission and lack of proof means that the racial preference is more than that which is necessary to remedy the wrong. This court has always required that in cases such as this, the remedy be carefully tailored so that it is congruent with the wrong. Relief that exceeds this purpose is unconstitutional. See generally, *General Building Contractors v. Pennsylvania,* 458 US 375 (1982); *Regents of the University of California v. Bakke, supra,* 438 US at 299; *Hills v. Gatreaux,* 425 US 284, 293-94 (1976); *Milliken v. Bradley,* 418 US 717, 738, 744 (1974); *Swann v. Charlotte-Mecklenburg Board of Education,* 402 US 1, 16 (1971).

litigating what this Court has termed the "ultimate question of discrimination *vel non*," *Aikens v. United States Postal Serv.*, ____ US ____, 103 S.Ct. 1478 (1983). The ruling portends promotional decisions being made on the basis of class-wide statistics of racial and ethnic composition rather than upon individual merit as is required by State Law and despite the clear language of Title VII itself. See 42 USC 2000e-2(j). In short, a thinly disguised quota system has been adopted guaranteeing that the rate and level of passage for all ethnic and racial groups will precisely reflect the racial and ethnic make up of the pool of candidates taking the test.

The Court of Appeals rejected petitioners' contention that statistical disparity alone is an insufficient predicate for the imposition of a promotional scheme that prefers minorities and trammels the legitimate interests of the petitioners. This is error as decisions of this Court require a *proven* statutory or constitutional violation requiring a remedy before a race-conscious remedy can be imposed. Otherwise, it is not a remedy at all but rather impermissible racial discrimination. Without the requisite finding of discrimination "it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm [upon petitioners]." *Bakke, supra,* 438 US at 309. There is no basis for a finding of discrimination against the minority candidates here.

Instead of considering the constitutional and statutory rights of petitioners, the Court of Appeals utilized a portion of the "sample pattern of proof," *McDonald v. Santa Fe Trail Transportation Co.*, 427 US 273, 279 n.6 (1976), to abrogate those rights even though racial preference was granted outside of the context of litigation. This was error.

The "sample pattern of proof" was "never intended to be rigid, mechanized or ritualistic [but] merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination," *Furnco Construction Corp. v. Waters, supra,* 438 US at 577 (1978). The "specification . . . of the prima facie proof required . . . is not necessarily applicable in every respect to differing factual situations." *McDonald v. Sante Fe Trail Transportation Co., supra,* 47 US at 279, n.6 (1976); *McDonnell Douglas Corp. v. Green,* 411 US 792, 802 n.13 (1973). The pattern of proof applied by the Court below was inappropriate for the facts of this case.

Approval of a racial "remedy" based upon the State's refusal to come forward and refusal to allow petitioners to demonstrate that any prima facie showing could be in turn rebutted pursuant to the "sample pattern of proof," resulted in a determination that impact alone could form the basis for the race-conscious "remedy." This "impact alone" analysis has been explicitly rejected, *Pullman-Standard v. Swint,* 456 US 273 (1982); *Bakke, supra,* 438 US at 308, n.44. The Court of Appeals' reasoning ignored the admonition that "[e]ven a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. This Court has never held, that discrimination must always be inferred from such consequences." *Los Angeles Department of Water & Power v. Manhart,* 435 US at 702, 710 n.20 (1978). See also *Washington v. Davis,* 426 US 229 (1975); 42 USC §2000e (2) (j). Likewise, it ignored the rules that a "*prima facie* showing is not the equivalent of a factual finding of discrimination," *Furnco Construction Corp. v. Waters, supra,* 438 US at 579, and that an adjudication of discrimination is a constitutional prerequisite to the imposition of a race-conscious remedy that trammels the interests of innocent third parties. *Bakke, supra,* 438 US at 307-10.

More important, the Court below ignored that what the State had done was to unilaterally and voluntarily create a racial classification without any proof of justification or any compelling State interest.

The Court of Appeals' approval of the racial classification flies in the face of the teachings of this Court that "[a] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon extraordinary justification." *Personnel Administrator of Massachusetts v. Feeney,* 442 US 256, 272 (1979). No extraordinary justification for the presumptively invalid racial classification has been shown. Contrary to the presumption in the pattern of proof applied by the Court below, the constitutionally presumptive invalidity of the State's action requires the *State* to justify its racial classification.[6] This the *State* has not done and the Court below simply ignored that fatal deficiency.

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[6]The *presumption* against racial classifications, *Personnel Administrator of Massachusetts v. Feeney, supra,* 442 US at 272, is deeply rooted in our law and reflects predominant and fundamental constitutional principles. See, e.g., *Loving v. Virginia,* 388 US 1 (1967). On the other hand, the presumption set forth in the "sample pattern of proof" is "merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Construction Corp. v. Waters, supra,* 438 US at 577. To the extent that the procedural presumption in the pattern of proof conflicts with the presumptive invalidity of racial classifications the presumption that racial classifications are invalid controls. The presumption "grounded in a predominant social policy [should be applied]". McCormick Evidence, §312 at 653 (1954); See, also, Weinstein's Evidence, ¶301[04] at 301-48-49, n.4. ("Rule 15 of the Uniform Rules of Evidence provides 'If two presumptions arise which are conflicting with each other, the judge shall apply the presumption which is founded on the weightier considerations of policy and logic. If there is no such preponderance, both presumptions shall be disregarded.') . . ." *Id.* Here, the sample pattern of proof used to infer discrimination in contested cases should give way to the presumptive illegality of the State's racial classification action thereby requiring the State to come forward with proof to justify its racial classification. This is in line with the teachings of *Bakke, supra* and *Fullilove v. Klutznick, supra,* which require an adjudication of discrimination prior to permitting the imposition of race-conscious remedies.

The Court below ignored the presumptive invalidity of the racial classification and the requirement that the State set forth "extraordinary justification" for its unequal treatment of petitioners and accepted as justification the State's decision not to defend the test for economic reasons to petitioners' detriment.

In this sensitive area, resolution of the ultimate issue of discrimination *vel non* should not be left to the unreviewed discretion of middle level state bureaucrats. The claim that Blacks and Hispanics could make a prima facie showing of discrimination was never proven or admitted and 42 USC §2000(e)(2)(h) was simply ignored. To base the displacement of the petitioners' rights and loss of seniority benefits and promotional opportunity upon a mere perception of a potential claim is contrary to *EEOC v. Ford Motor Co.*, 458 US 219, 240 (1982).

Finally, since there has been neither a finding nor even any inquiry, that any of the preferred minority candidates have been victims of any discrimination, either in the past or as a result of this test; the grant of a racial preference to these candidates violates the teachings of *Stotts* that only victims of proven illegal discrimination may be given the benefits of a racial preference. See *Stotts, supra,* 81 L Ed 2d at pp. 499-501.

Conclusion.

This Court should grant the petition for certiorari to resolve these fundamental and important issues.

Respectfully submitted,

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APPENDIX A.

Decision of the United States Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 779—August Term, 1983

(Argued February 15, 1984 Decided April 16, 1984)

Docket No. 83-7893

JAMES BUSHEY, ROGER D. BELL, ROBERT W. FERBER, WILLIAM J. NORTON, ROBERT J. SEITZ, GEORGE BARTLETT, CHARLES PAGE, WAYNE WILHELM, WAYNE L. STRACK, ROBERT FUCCI, GARY H. FILION, EDWARD D. ROGAN, MILES BARNES, DONALD E. CLARK and GERALD SWEENEY, each individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

—v.—

NEW YORK STATE CIVIL SERVICE COMMISSION; JOSEPH VALENTI, in his capacity as President of the New York State Civil Service Commission and Civil Service Commissioner; JOSEPHINE GAMBINO and JAMES MCFARLAND, in their capacity as Civil Service Commissioners; THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES; and THOMAS A. COUGHLIN, III, in his capacity as Commissioner of the New York State Department of Correctional Services,

Defendants-Appellants,

—and—

GERALD A. WELLS, WILBUR I. WRIGHT, JOSEPH P. BATES, THOMAS D. HASKELL, and PERCY JONES,

Intervenors-Appellants.

Before:

TIMBERS, MESKILL and PIERCE,
Circuit Judges.

Appeal from an order and judgment of the United States District Court for the Northern District of New York, Miner, *Judge*, denying appellants' motions for summary judgment, granting appellees' motion for summary judgment and enjoining defendants-appellants from making appointments to the position of Correction Captain from an eligibility list based on examination scores adjusted to eliminate perceived adverse racial impact against minority candidates of a written civil service examination.

Reversed and remanded.

RICHARD R. ROWLEY, Albany, New York (Ronald G. Dunn and Mark T. Walsh, Jr., Rowley, Forrest and O'Donnell, P.C., Albany, New York, of counsel), *for Plaintiffs-Appellees.*

ANN HOROWITZ, Assistant Attorney General, New York, New York (Robert Abrams, Attorney General of the State of New York, Melvyn R. Leventhal, Deputy First Assistant Attorney General, Barbara B. Butler, Assistant Attorney General and Brenda S. Spears, Assistant Attorney General, New York, New York, of counsel), *for Defendants-Appellants*.

PAUL A. CROTTY, New York, New York (John D. Shyer and Richard W. Mark, Donovan Leisure Newton & Irvine, New York, New York, of counsel), *for Intervenors-Appellants*.

PIERCE, *Circuit Judge*:

Defendants-Appellants ("Defendants" or "the State") and Intervenors-Appellants ("Intervenors") appeal from an order and judgment of the United States District Court for the Northern District of New York, Roger J. Miner, *Judge*, filed October 4, 1983, denying Defendants' and Intervenors' motions for summary judgment and granting Plaintiffs-Appellees' ("Plaintiffs") motion for summary judgment. The district judge also enjoined Defendants from making appointments to the position of Correction Captain ("Captain") of the New York State Department of Correctional Services ("Correctional Services") from an eligibility list that was based on certain examination scores adjusted to eliminate what Defendants perceived to be the adverse racial impact against minority candidates

of a written examination administered by the New York State Civil Service Commission ("Civil Service"). The district judge agreed with Plaintiffs, who are nonminority candidates for the position of Captain, that the State's adjustment of the minority candidates' raw test scores discriminated against nonminority candidates in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2 to 2000e-17 (1976 & Supp. V 1981) ("Title VII").

For the reasons set forth below, we reverse the order and judgment of the district court and we remand for further proceedings consistent with this opinion.

I. BACKGROUND

This action represents the most recent chapter in the controversial history of promotional examinations administered by the Civil Service for supervisory titles in the State's Correctional Services. The instant dispute began on January 30, 1982, when the Civil Service and the Correctional Services conducted Promotional Examination No. 37-526 for the position of Correction Captain. At the time the examination was given, no minority officers held permanent appointments as Captains in the State's prisons. After administering the test, the Civil Service tabulated each candidate's right and wrong answers to arrive at the candidates' raw scores. The tabulation results indicated that nonminority candidates had passed the test at about twice the rate as minority candidates,[1] as follows:

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[1] The Hispanic candidates were included in the minority grouping even though they had a 50% passing rate (two out of four).

	Test Takers	*Passing Candidates*	*Passing Rate*
Nonminority ..	243	119	49%
Minority	32	8	25%

In view of the "four-fifths" rule of the Equal Employment Opportunity Commission ("EEOC") Uniform Guidelines on Employee Selection, 29 C.F.R. § 1607.4(D) ("Guidelines"),[2] the State determined that the Captains' examination had an adverse racial impact on minority candidates because the passing rate of minority candidates was approximately fifty percent lower than the passing rate of nonminority candidates. Taking into account other factors that it felt reinforced its conclusion of adverse impact,[3] the State adjusted both the minority and

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2 29 C.F.R. § 1607.4(D) provides, in pertinent part, that

> [a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.

In other words, under the Guidelines, a selection rate for minorities lower than 80% of the selection rate for the highest scoring group may be regarded as evidence of adverse impact.

3 Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment listed these factors as follows:

> [T]he basis for the decision to use differential scoring was the adverse impact of the written test, the litigation history of examinations for Corrections supervisory security titles, the lack of any empirical data indicating that minority and non-minority candidates for Captain would not perform equally well on the job, and the availability of data regarding the performance of minorities and non-minorities in the two supervisory titles directly below Correction Captain.

The first two factors are discussed in the text. As to the third factor, the State explains the absence of data about minority performance in the position of Captain by noting that at the time of the examination, no minority persons held permanent positions as Correction Captains. The fourth factor involved empirical data that demonstrated that

nonminority candidates' scores by converting them to separate frequency distributions and then equating or normalizing them with the respective means. The effect was to increase to fifty percent the percentage of minorities who passed the test. From the State's perspective, this adjustment served to correct the adverse racial impact of the test by equalizing the passing rate of minority and nonminority candidates. In practical terms, the adjustment added eight minority candidates to the eligibility list without removing any of the 119 nonminorities from the list.

By acting to eliminate the perceived adverse impact of the examination on minorities, the State sought anticipatorily to avoid litigation it assumed minority candidates would bring challenging reliance on the test to promote candidates to the position of Captain. Such litigation had resulted from the use of past promotional examinations with respect to Correction Sergeants in 1972, *Kirkland v. New York State Department of Correctional Services*, 374 F. Supp. 1361 (S.D.N.Y. 1974), *aff'd in part and rev'd in part*, 520 F.2d 420 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976), *on remand*, 482 F. Supp. 1179 (S.D.N.Y.), *aff'd*, 628 F.2d 796 (2d Cir. 1980), *cert. denied*, 450 U.S. 980 (1981)("*Kirkland Sergeants*"), and Correction Lieutenants in 1981, *Kirkland v. New York State Department of Correctional Services*, 552 F. Supp. 667 (S.D.N.Y. 1982), *aff'd*, 711 F.2d 1117 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 997 (1984)("*Kirkland Lieutenants*").

The State did not succeed in staving off litigation; this time it was initiated by the nonminority candidates, who

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minorites and nonminorities performed equally well in the categories of Lieutenants and Sergeants. Appendix at 302-03; *Kirkland v. New York State Department of Correctional Services*, 482 F. Supp. 1179, 1182 (S.D.N.Y.), *aff'd*, 628 F.2d 796 (2d Cir. 1980), *cert. denied*, 450 U.S. 980 (1981).

brought the instant action contending, *inter alia*,[4] that the State's adjustment of candidates' raw scores involved "reverse discrimination" in violation of Title VII. In its answer to the complaint, the State responded that it acted in good faith and in compliance with applicable law by voluntarily adjusting the raw scores to eliminate the examination's adverse impact. A group of minority candidates moved to intervene as defendants to assert that the written test had a facially discriminatory impact against them, that the use of separate frequency distributions to eliminate such adverse impact was proper, and that the remedial action taken by the State was the minimum necessary given the past pattern of discrimination that had been the subject of the *Kirkland Sergeants* and the *Kirkland Lieutenants* actions. The district judge granted the application to intervene by an order dated February 16, 1983.

In June, 1983, all parties moved for summary judgment. After hearing oral argument and reviewing the papers submitted by the parties in support of their respective positions,[5] Judge Miner denied Defendants' and In-

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[4] Plaintiffs' complaint also asserted pursuant to 42 U.S.C. § '983 a violation of their fourteenth amendment rights under the United States Constitution, as well as violations of 42 U.S.C. § 1981 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. The district court rejected these claims and Plaintiffs do not renew them on appeal. Therefore, these claims are not before us. We also are foreclosed by the Supreme Court's recent decision in *Pennhurst State School and Hospital v. Halderman*, 52 U.S.L.W. 4155 (U.S. Jan. 23, 1984), from considering the claim in Plaintiffs' complaint that Defendants failed to comply with state law.

[5] Defendants contend that at the close of oral argument on the summary judgment motions before the district judge, they requested but were denied leave to submit late an affidavit in response to the affidavit of Plaintiffs' expert, Dr. Kanavagh, submitted in support of Plaintiffs' motion for summary judgment. We assume that on remand Defendants will have an opportunity to introduce evidence in support of their position.

tervenors' motions, granted Plaintiffs' motion for summary judgment, and enjoined Defendants from making appointments to the position of Captain based on the eligibility list.

The district judge based his conclusion on three principal grounds. He held that the factors considered by the State--the distribution of scores from the written test, the litigation history of prior Correctional Services examinations for supervisory titles, the absence of empirical data indicating that minority and nonminority candidates would not perform equally well as Captains, and the availability of some data regarding the job performance of minority candidates in the two supervisory titles directly below Captain—[6] did not establish a prima facie case of adverse racial impact vis-a-vis minority candidates. Moreover, he held that even assuming, *arguendo*, that the State had shown in defense of its actions a prima facie case of adverse racial impact, it still had acted in violation of Title VII because it had not proved that the inference of racial discrimination arising from a showing of adverse impact could not be rebutted by proof that the differences in test performance were job-related. In effect, the district judge held that before taking any voluntary action to eliminate the adverse racial impact of its selection process, the State, as an employer, had to meet the following two burdens: (1) make out a prima facie case of discrimination (in this context, adverse impact), and (2) prove that such prima facie case was not rebuttable. Finally, the district judge concluded that "[e]ven assuming the propriety of the need for defendants' actions in remedying the alleged discriminatory impact of [the] promotional procedures, the method by which de-

6 As to the last two factors, see *supra* note 3.

fendants chose to effect their remedy was itself fundamentally flawed."

Upon review, we hold that the district court erred with respect to each of these grounds in granting summary judgment in favor of Plaintiffs. Consequently, we reverse and remand.

II. DISCUSSION

A. *Prima Facie Case of Adverse Impact*

Plaintiffs argue that the district court held that the raw scores on the examination did not establish a prima facie case of adverse impact because, in Plaintiffs' words, the "statistical sample of Black and Hispanic candidates was simply too small to serve as a basis for a finding that the adverse impact was due to race or national origin." This contention, however, mischaracterizes the holding of the district judge, who expressly stated that he was "not prepared to hold that a pool consisting of thirty-two minorities and 240 or so nonminorities, is, as a matter of law, an inadequate number from which to draw statistical inferences." Instead, relying on a report submitted by Dr. Kavanagh, Plaintiffs' statistical expert, the district judge held that the admitted differences in score distributions resulted from differences in the prior experiences of several of the minority candidates. The record does suggest that of the candidates who took the examination, at least eleven of them qualified because of their experience as Correctional Supervising Officers with the Office of Drug Abuse Services ("ODAS"). Of those eleven, six were minority candidates. The district court, relying on the affidavit of Plaintiffs' expert, reasoned that the difference in test scores resulted not from an adverse racial

impact of the test, but from this difference in employment experience between minority and nonminority candidates.

This reasoning does not comport with adverse impact analysis. The case law clearly provides that a prima facie case is established by a showing that an examination has an adverse racial impact on minority candidates. Thereafter, legitimate, job-related explanations for differences in score distributions become relevant to rebut the prima facie showing of adverse racial impact. *See, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-36 (1971); *Kirkland Lieutenants*, 711 F.2d at 1132; *Guardians Association of New York City Police Department, Inc. v. Civil Service Commission*, 630 F.2d 79, 86-87 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981); *Vulcan Society of New York City Fire Department, Inc. v. Civil Service Commission*, 490 F.2d 387, 391-92 (2d Cir. 1973). Contrary to this approach, Judge Miner held that there had been no prima facie showing of adverse racial impact because the ODAS experience of some of the minority candidates explained the differences in score distributions. In other words, he turned to job-related explanations, which might be appropriate to rebut a prima facie showing of adverse impact, in order to determine that the prima facie case had not been made in the first place. This court previously rejected such an approach, urged by nonminority intervenors in the *Kirkland Lieutenants* case, by noting that "[a]lthough lack of experience may be relevant to the question of a test's job validity, it does not affect the question whether a *prima facie* case has been properly established." *Kirkland Lieutenants*, 711 F.2d at 1132. Even if prior experience were relevant to the prima facie showing of adverse impact, which it is not, we note, as

the court in *Kirkland Lieutenants* stated, that the difference "in responsibility between Office of Drug Abuse [Services] officers and officers working at minimum and medium security [Correctional Services] facilities has been held to be negligible." *Id.* (citing *Stokes v. New York State Department of Correctional Services*, No. 80 Civ. 1364 (S.D.N.Y. Sept. 27, 1982)).

Having put aside the district court's erroneous interpretation of the prima facie case, we turn to Defendants' assertion that the test scores, and the application of the EEOC's "four-fifths" rule, established a prima facie showing of adverse impact. It is well-settled in the case law that "[a] prima facie violation of [Title VII] may be established by statistical evidence showing that an employment practice has the effect of denying the members of one race equal access to employment opportunities." *New York Transit Authority v. Beazer*, 440 U.S. 568, 584 (1979); *see also Albemarle v. Moody*, 422 U.S. at 425 (prima facie case of adverse impact established by proof "that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants"); *Kirkland Lieutenants*, 711 F.2d at 1130 (upholding district court's finding of a "*prima facie* case of employment discrimination through a statistical demonstration of disproportionate racial impact"); *Guardians v. Civil Service*, 630 F.2d at 88 ("statistics showing a significantly disparate racial impact have consistently been held to create a presumption of Title VII discrimination"); *Vulcan Society v. Civil Service*, 490 F.2d at 392-93 (upholding district court's finding of adverse impact by comparing test passing rates of minority and nonminority candidates). Similarly, "[w]hile courts are not bound by the EEOC Guidelines, the Supreme Court has declared that the guidelines should be shown

'great deference.' " *Teal v. Connecticut*, 645 F.2d 133, 137 n.6 (2d Cir. 1981)(quoting *Griggs*, 401 U.S. at 433-34, and citing *Albemarle v. Moody*, 422 U.S. at 431), *aff'd*, 457 U.S. 440 (1982); *see also Guardians*, 630 F.2d 88 ("By any reasonable measure, including . . . the four-fifths rule of the EEOC Guidelines, Exam No. 8155 had a disparate racial impact.").

Herein, the differences between the score distributions of minority and nonminority candidates were sufficient to establish a prima facie showing of adverse impact. Twenty-five percent of the minority candidates passed the test whereas nonminority candidates passed at a rate of forty-nine percent. Thus, the passing rate of minority candidates was approximately fifty percent lower than the passing rate of the nonminority candidates. In other words, about five minority candidates passed the Correction Captain examination for every ten nonminority candidates who passed it.

In short, the test data established a prima facie case of adverse impact against minority candidates as a group. We cannot conclude, however, that the test data, by itself, establishes adverse impact as to Hispanic candidates, who were included within the minority grouping, since the record indicates that fifty percent—two of the four—of the Hispanic candidates who took the test passed it. It remains an open question, to be explored fully on remand, whether as to the Hispanic candidates there exists, on the basis of other factors cited by the State, "a sufficiently serious claim of discrimination to serve as a predicate" for the State's voluntary remedial actions.[7] *Kirkland Lieutenants*, 711 F.2d at 1130.

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[7] Our discussion *infra* is not meant to suggest that only a prima facie showing of adverse impact can serve as a sufficient predicate to voluntary remedial measures under Title VII. As discussed below,

B. *Burden to Rebut*

The district court also held, and Plaintiffs argue on appeal, that even if Defendants had made a prima facie showing of adverse racial impact, before adopting remedial measures they still had to demonstrate that such a case was not rebuttable by proof that the score distribution differences were not job-related. In other words, the district judge ruled that before taking steps to rectify a perceived violation of Title VII, the State, as an employer, had to meet two burdens—first establish a prima facie case of discrimination and then prove that such prima facie case was not rebuttable through job-related explanations. We hold that, in the context of this case, the imposition of the latter burden on a party seeking to comply voluntarily with Title VII is contrary to the case law and the statute's underlying policy.

As this court noted recently, "[i]t is settled that voluntary compliance is a preferred means of achieving Title VII's goal of eliminating employment discrimination." *Kirkland Lieutenants*, 711 F.2d at 1128; *see also Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981) ("[in] enacting Title VII, Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims"); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) ("[c]ooperation and voluntary compliance were selected as the preferred means for achieving this goal"). By requiring proof of not only a prima facie case of adverse impact, but also of the inability to rebut such a case, the district court in effect posited a rule, contrary to the stated policy of voluntary

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Kirkland Lieutenants, 711 F.2d at 1130, only requires "a sufficiently serious claim of discrimination." On remand, the State may show such a claim as to the Hispanic candidates on the basis of factors other than the subject examination scores.

compliance, permitting an employer, here the State, to take remedial actions only where there could be a judicial determination of racial discrimination.

This court expressly rejected such an approach when it was urged in the context of a voluntary settlement by nonminority employees who intervened to oppose the settlement agreed to by the parties in the *Kirkland Lieutenants* case. 711 F.2d at 1129-30. Herein, Plaintiffs' situation is analogous to the position of the intervenors in *Kirkland Lieutenants*, where minority employees challenged the State's use of an examination to promote candidates to the position of Correction Lieutenants. *Id.* at 1121. In *Kirkland Lieutenants*, the nonminority intervenors argued that "before any race-conscious relief can be granted to plaintiff class, there must be a judicial determination that Exam 36-808 and its resulting eligibility list are not job-related and are therefore racially discriminatory, *i.e.*, a mere statistical showing of disproportionate impact does not amount to a proper basis for settlement." *Id.* at 1129. This contention is essentially the same one raised by Plaintiffs herein and adopted by the district court; that is, this contention amounts to a claim that the State must prove the inability to rebut the prima facie case by showing that the differences in score distributions were not job-related. In *Kirkland Lieutenants*, this court rejected this argument on the ground that it "would turn Title VII law on its head since . . . job-relatedness is never presumed . . . ." *Id.*; *see Guardians v. Civil Service*, 630 F.2d at 86-87; *Vulcan Society v. Civil Service*, 490 F.2d at 391-92. Moreover, "if intervenors' [in the instant case, Plaintiffs'] position were adopted, no Title VII testing case could be settled by agreement until a judicial determination on the test's job validity was made.

Such a result would seriously undermine Title VII's preference for voluntary compliance . . . ." *Kirkland Lieutenants*, 711 F.2d at 1130 (citations omitted). Consequently, as Judge Lumbard wrote in *Kirkland Lieutenants* in the context of voluntary settlements, "a *prima facie* case of employment discrimination through a statistical demonstration of disproportionate racial impact constitutes a sufficiently serious claim of discrimination to serve as a predicate for a voluntary compromise containing race-conscious remedies." *Id.*

Plaintiffs attempt to distinguish *Kirkland Lieutenants* on the ground that the compliance plan therein was adopted on the basis of "arms' length" settlement negotiations. This distinction, however, is unpersuasive. It implies that the interests of nonminority employees were somehow more protected in *Kirkland Lieutenants*, where the State adopted the remedial plan under negotiation pressure from minority candidates, than they were in the instant case, where the State adopted the plan without such direct pressure.

Moreover, Plaintiffs' purported distinction would create an anomalous situation. It would require an employer, in this case the State, to issue a presumptively discriminatory eligibility list, wait to be sued by minority candidates, and only then seek a settlement pursuant to *Kirkland Lieutenants*. Such an approach would serve no purpose other than to impede the process of voluntary compliance with Title VII and cause the proliferation of litigation in all such cases, thereby generating litigation costs and favoring litigious over nonlitigious employees.

The "rebuttal burden" urged by Plaintiffs and adopted by the district court also is contrary to the Supreme Court's approach in *United Steelworkers of America v.*

Weber, 443 U.S. 193 (1979).[8] Without requiring a judicial determination of racial discrimination (in fact, the defendant therein denied that it had engaged in past discrimination), the majority in *Weber* upheld, as permissible under Title VII, an affirmative action plan "designed to eliminate conspicuous racial imbalance in traditionally segregated job categories." *Id.* at 209 (footnote omitted). In doing so, the Court rejected the contention raised by nonminority plaintiffs that a judicial determination of racial discrimination was a necessary predicate to the adoption of race-conscious remedial measures. The broadness of the majority's view is suggested by Justice Blackmun's concurrence, which in urging a narrower ground nevertheless noted that "[t]he Court . . . declines to consider the narrow 'arguable violation' approach and adheres instead to an interpretation of Title VII that permits affirmative action by an employer whenever the job category in question is 'traditionally segregated.' " *Id.* at 212.[9]

In short, we hold that consistent with *Kirkland Lieutenants*, 711 F.2d at 1130, and *Weber*, 443 U.S. at 209, a showing of a prima facie case of employment discrimina-

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8 We reject Plaintiffs' contention that *Weber*, 443 U.S. 193, is inapplicable because the employer in *Weber* was a private entity whereas here it is a public entity. *See, e.g., Kirkland Lieutenants*, 711 F.2d at 1130 (applying *Weber*); *Bratton v. City of Detroit*, 704 F.2d 878, 884 n.18 (6th Cir. 1983)(applying *Weber* in suit by nonminority policemen against the City of Detroit), *cert. denied*, 104 S. Ct. 703 (1984); *Local Union No. 35 v. City of Hartford*, 625 F.2d 416, 425 (2d Cir. 1980)(applying *Weber* in suit against the City of Hartford), *cert. denied*, 453 U.S. 913 (1981).

9 During oral argument, a question was raised as to whether a nonminority person *ever* had held a permanent appointment to the position of Captain in a State prison. The record apparently does not offer evidence with respect to this issue. On remand, the parties may wish to explore this point in connection with our discussion *supra* note 7 and the standard set forth in *Weber*, 443 U.S. at 209.

tion through a statistical demonstration of disproportionate racial impact constitutes a sufficiently serious claim of discrimination[10] to serve as a predicate for employer-initiated, voluntary race-conscious remedies.[11]

C. *Adjustment Methodology*

The district judge also held that "[e]ven assuming the propriety of the need for defendants' actions in remedying the alleged discriminatory impact of [the] promotional procedures, the method by which defendants chose to effect their remedy was itself fundamentally flawed." Despite the possible statistical weaknesses in the State's approach,[12] the relevant question under *Weber* is whether

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10 This holding is not intended to suggest that a showing of adverse racial impact is the only "sufficient serious claim of discrimination" that can serve as a predicate for voluntary remedial measures under Title VII. *See supra* notes 7 and 9.

11 Contrary to Plaintiffs' contention, the Supreme Court's decision in *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), does not require an opposite result. Therein, minority employees brought a Title VII action against an employer, alleging discrimination on the basis of race. The Supreme Court reversed, holding that the circuit court erred in making a judicial determination of discrimination by merging the prima facie showing of disparate treatment under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny with the rebuttal question. Herein, we do not merge the prima facie and rebuttal questions. We only hold that consistent with *Kirkland Lieutenants*, 711 F.2d at 1130, and *Weber*, 443 U.S. at 209, a judicial determination of racial discrimination is not a prerequisite to an employer adopting voluntary, race-conscious remedies to comply with Title VII.

12 In concluding that the normalization and standardization process employed by the State was methodologically flawed, the district judge relied principally on the affidavit of Dr. Kavanagh, Plaintiffs' expert, which states that

> a normal distribution of scores achieved by a sufficient number of test takers when placed on a graph plotting the number of candidates achieving each score will result in a so-called "bell curve" which is created because most of the candidates receive marks in the middle range of scores while there are relatively few candidates who

in practical terms the plan "unnecessarily trammel[ed] the interests" of the nonminority employees. 443 U.S. at 208. Herein, as in *Weber*, the adjustment plan did not displace any nonminority candidates from the eligibility list (it merely added eight minority candidates to the list), did not place an absolute bar to the advancement of nonminority candidates, and was only temporary in nature. Moreover, the plan in the instant case was tailored narrowly to eliminate the adverse impact of the test and did not aim at maintaining a racial balance *in futuro*. Yet, we agree with the Court of Appeals for the District of Columbia that "*Weber* [does not] support[ ] the proposition that no purported affirmative action plan is ever unlawful unless it requires discharge, permanently bars advancement, or maintains racial balance . . . ." *Parker v. Baltimore and Ohio Railroad Co.*, 652 F.2d 1012, 1014 (D.C. Cir. 1981). We conclude that herein the record is insufficient to determine whether the State's adjustment plan trammeled the interests of the nonminority candidates. Therefore, we remand to the district court for a full exploration of this disputed issue. *See id.* (concluding that the record did not contain sufficient information on the effect of affirmative action plan on nonminority

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receive the highest scores or the lowest scores. Such a bell curve is . . . known as a normal distribution. . . . I have plotted the scores, and upon plotting the scores of the non-minority candidates, . . . the result is a typical bell curve. By contrast, when the scores of the 34 minority candidates are plotted on a graph, the line resulting is relatively flat, it is not a bell curve and prohibits standardizing scores based on the normal curve. The fact that there are only 34 minority candidates, not the minimum 100 needed to *allow* normalization . . . exacerbates an already incorrect methodology.

Appendix at 282 (emphasis in original). On appeal, Defendants contend that the district judge denied them the opportunity to respond to the statistical arguments set out in Dr. Kavanagh's affidavit. *See supra* note 5.

employees, and holding that therefore "a crucial fact remained disputed, and . . . summary judgment was premature").

III. CONCLUSION

For the foregoing reasons, we reverse the judgment and order of the district court and we remand for further proceedings consistent herewith.

APPENDIX B.

Decision of the United States District Court.

James BUSHEY, Roger D. Bell, Robert W. Ferber, William J. Norton, Robert J. Seitz, George Bartlett, Charles Page, Wayne Wilhelm, Wayne L. Strack, Robert Fucci, Gary H. Filion, Edward D. Rogan, Miles Barnes, Donald E. Clark and Gerald Sweeney, each individually and on behalf of all others similarly situated, Plaintiffs,

v.

The NEW YORK STATE CIVIL SERVICE COMMISSION; Joseph Valenti, in his capacity as President of the New York State Civil Service Commission and Civil Service Commissioner; Josephine Gambino and James McFarland, in their capacity as Civil Service Commissioners; The New York State Department of Correctional Services; and Thomas A. Coughlin, III, in his capacity as Commissioner of the New York State Department of Correctional Services, Defendants,

Gerald A. Wells, Wilbur I. Wright, Joseph P. Bates, Thomas D. Haskell and Percy Jones, Defendants-Intervenors.

No. 82-CV-1219.

United States District Court,
N.D. New York.
Oct. 3, 1983.

Reverse discrimination action was brought arising out of alleged racially discriminatory treatment of nonminority plaintiffs in context of their civil service employment with State Department of Correctional Services. On cross motions for summary judgment, the District Court, Miner, J., held that: (1) supplementation of test scores of minority candidates with racial bonus in order to compensate for alleged adverse racial impact contained in test violated Title VII, despite contention that supplementation could be justified in name of prospective compliance with Title VII; (2) defendants arbitrarily and unilaterally transformed what they perceived to be a prima facie showing of Title VII violation into conclusive finding of illegal discrimination, without properly considering or permitting the possibility of, or opportunity for, rebuttal; (3) even assuming propriety of need for defendants' actions in

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remedying alleged discriminatory impact of the department's promotional procedures, method by which defendants chose to effect the remedy was itself fundamentally flawed; and (4) although appointments based on adjusted results would be enjoined, white employees were not entitled to compensatory relief in form of back pay.

Ordered accordingly.

1. Civil Rights ⇐9.12

If strict compliance with mandated merit procedures were to lead to illegal racial discrimination under, for example, a Title VII analysis, then state law must yield to this overriding federal constitutional consideration. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

2. Civil Rights ⇐9.13

Even though adjustment of minority candidates' scores on captains examination in order to effect prospective compliance with Title VII only added names of eight minorities to eligible list and did not result in attendant "bumping" of eight nonminorities from list, effect as to nonminorities

was not an innocuous one, in that, since appointments to captains positions are made beginning with those at top of the eligible list, a shuffling of order of the list created the adverse impact. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

3. Civil Rights ⇐9.13

By its terms, Title VII expressly prohibited actions of defendants in adjusting upward test scores of minority candidates for captain's positions. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

4. Civil Rights ⇐9.13

Neither adverse impact of written captains examination, litigation history of examinations for corrections supervisor security titles, lack of any empirical data indicating that minority and nonminority candidates for captain would not perform equally well on job, nor availability of data regarding job performance of minorities and nonminorities in two supervisory titles directly below corrections captain, individu-

ally or collectively, was sufficient to support proper finding of adverse impact to justify remedial action whereby test scores of minority candidates were supplemented with racial bonus in order to compensate for alleged adverse racial impact contained in test, in that, taking as true findings of plaintiffs' statistical expert, statistics relied on by defendants simply were not sufficient basis upon which to predicate determination of adverse impact requiring remedial measures, however lamentable may have been defendants' promotional practices in the past, it was not axiomatic that present exam suffered equal infirmities, and defendants' reliance on data regarding job performance was misplaced. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

5. Civil Rights ⇐43, 44(1)

Statistical showing of adverse impact creates a presumption of Title VII discrimination, and, in appropriate circumstances, may even serve to establish a prima facie case of employment discrimination. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

6. Civil Rights ⇐43

In standard Title VII testing case, a defendant effectively may rebut a plaintiff's prima facie case of discrimination by proving that test was legitimately job related. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

7. Civil Rights ⇐9.13

Assuming, arguendo, defendants were confronted with a legitimate showing of adverse impact upon minority candidates taking captains examination, defendants arbitrarily and unilaterally transformed what they perceived to be a prima facie showing of Title VII violation into conclusive finding of illegal discrimination, without properly considering or permitting possibility of, or opportunity for, rebuttal. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

8. Civil Rights ⇐9.13

Even assuming propriety of need for defendants' actions in remedying alleged discriminatory impact of Department of Correctional Services promotional proce-

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cedures, method by which defendants chose to effect their remedy, namely, supplementing test scores of minority candidates with a racial bonus, was itself fundamentally flawed, in that, in adjusting minority scores, Hispanics unnecessarily were included in group whose scores were inflated artificially by defendants' process because two of the four Hispanics who took exam passed, and, despite fact that defendants' separate frequency distribution apparently had resulted in making more minority candidates eligible for promotion to captain, defendants had come forward with no evidence controverting plaintiffs' claim that new method was not as effective as the one it replaced. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

9. Federal Civil Procedure ⇐103

Standing requires that a plaintiff allege such a personal stake in outcome of controversy as to warrant his invocation of federal court jurisdiction and to justify exercise of court's remedial powers on his

behalf; plaintiff must suffer a concrete, personal injury as a result of the acts which he challenges.

10. Civil Rights ⇐13.6

Two white employees who failed Department of Correctional Services examination lacked standing to challenge defendants' actions in supplementing test scores of minority candidates with a racial bonus in order to compensate for alleged adverse racial impact contained in test, in that none of their rights were affected by a rescoring of exam since their names would not have been placed on eligible list even without the challenged scoring adjustment.

11. Civil Rights ⇐13.6

Notwithstanding fact that some white employees would be promoted despite a shuffling of ranks on eligible list, the timing of these employees' promotions provided the concrete interest necessary for standing to challenge supplementation of test scores of minority candidates with racial bonus in order to compensate for alleged adverse

racial impact contained in captains examination.

12. Civil Rights ⇐13.6

Since, theoretically, all persons on eligible list remained eligible for promotion to captain, and because rank order on that list was all important, any re-ranking effect engendered by defendants' actions in supplementing test scores of minority candidates with a racial bonus in order to compensate for alleged adverse impact contained in captains examination conferred standing upon white employees whose ranks relegated them to lower end of eligible list.

13. Civil Rights ⇐9.13, 13.2(1)

Scoring adjustment to captains examination to eliminate alleged adverse racial impact contained in exam was in violation of Title VII, and thus defendants would be enjoined from making appointments to captain's positions based on the adjusted results. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

14. Federal Courts ⇐268

Eleventh Amendment does not bar back pay awards against states because Title VII was enacted pursuant to Congress' authority under enforcement powers conferred by the Fourteenth Amendent. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; U.S.C.A.Const. Amends. 11, 14.

15. Civil Rights ⇐46

Finding of violation of Title VII presumptively entitles a plaintiff to back pay and retroactive promotion or reinstatement. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

16. Civil Rights ⇐46

Back pay award remains within discretion of court and is available only where court finds that the respondeat has intentionally engaged in an unlawful employment practice. Civil Rights Act of 1964, §§ 701 et seq., 706(g), as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e-5(g).

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17. Civil Rights ⇐46

While defendants' actions in supplementing test scores of minority candidates with a racial bonus in order to compensate for alleged adverse racial impact contained in captains examination resulted in discrimination against white employees, defendants' intentions were only to comply with Title VII and did not manifest any deliberate attempt to discriminate against white employees, and thus request for compensatory relief in form of back pay would be denied. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

18. Civil Rights ⇐46

White employees of the Department of Correctional Services, who successfully challenged supplementation of test scores of minority candidates with racial bonus in order to compensate for alleged adverse racial impact contained in test, were entitled to award of costs, including reasonable

attorney fees, in an amount to be determined after further documentation by the parties. Civil Rights Act of 1964, §§ 701 et seq., 706(k), as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e–5(k); Fed.Rules Civ. Proc. Rule 56(c), 28 U.S.C.A.

Robert Abrams, Atty. Gen. of the State of N.Y., New York City, for defendants; Melvyn R. Leventhal, Barbara B. Butler, Brenda S. Spears, Ann Horowitz, Asst. Attys. Gen., New York City, of counsel.

Donovan, Leisure Newton & Irvine, New York City, for defendants-intervenors; Paul A. Crotty, John D. Shyer, Greta Glavis, New York City, of counsel.

Rowley, Forrest & O'Donnell, P.C., Albany, N.Y., for plaintiffs; Richard R. Rowley, Ronald G. Dunn, Albany, N.Y., of counsel.

MEMORANDUM–DECISION and ORDER

MINER, District Judge.

I

This rather novel reverse discrimination action arises out of the alleged racially discriminatory treatment of non-minority plaintiffs in the context of their civil service employment with the State of New York. The action is brought pursuant to 42 U.S.C. §§ 1981 and 1983, and Titles VI [1] and VII [2] of the Civil Rights Act of 1964. Jurisdiction is predicated upon 28 U.S.C. §§ 1331 and 1343. Before this Court are motions by all parties [3] for summary judg-

1. 42 U.S.C. §§ 2000d—2000d–4 (1981).

2. 42 U.S.C. §§ 2000e-2—2000e-17 (1981).

3. By an earlier unpublished Order of this Court, dated February 16, 1983, Gerald A. Wells, Wilbur I. Wright, Joseph P. Bates, Thomas D. Haskell and Percy Jones were permitted to intervene in the present action as parties defendant, pursuant to Fed.R.Civ.P. 24(b)(2).

While the present action as commenced purports to be a class action brought on behalf "of all others similarly situated," plaintiffs have not yet moved this Court for class certification pursuant to Fed.R.Civ.P. 23(c).

ment pursuant to Fed.R.Civ.P. 56(a) & (b).

II

The relative simplicity of the facts surrounding this controversy belies the rather subtle and intricate legal issues which are raised. Plaintiffs, fifteen white employees of the Department of Correctional Services ("DOCS"),[4] commenced this action on November 8, 1982 seeking to enjoin[5] defendants from making promotions on the basis of a controversial "eligible list." This list was derived from the results of Civil Service Examination No. 37-526 ("examination"). The examination, developed, administered and scored by defendant New York State Civil Service Commission ("CSC"), was taken by plaintiffs in January of 1982 in order to compete for promotion to the

4. Plaintiffs are all permanent Correction Lieutenants with an average of 19 years of service with the Department of Correctional Services.

5. Plaintiffs' request for preliminary injunctive relief subsequently was withdrawn after the parties stipulated that no further appointments to the position of Correction Captain would be made pending further order of this Court.

rank of Correction Captain. The present controversy centers upon the actual grading of the examination by defendant CSC. Essentially, plaintiffs claim that minority candidates' test scores improperly were supplemented with a "racial bonus" in order to compensate for an alleged adverse racial impact contained in the written test. A full understanding of the scoring methodology employed, and the claimed need for its use here, requires a brief survey of past litigation involving Corrections Department personnel.

In 1972, CSC, upon request of DOCS, prepared an examination to be taken by Corrections Department Officers in order to qualify for promotion to the rank of Sergeant. The examination was administered on October 14, 1972. Alleging that the test improperly discriminated against them on the basis of race, black and Hispanic Correction Officers challenged the test's constitutional validity. *Kirkland v. New York State Department of Correctional Services*, 374 F.Supp. 1361 (S.D.N.Y.1974), *aff'd in part, rev'd in part*, 520 F.2d 420 (2d Cir.

1975), *cert. denied*, 429 U.S. 823, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976) ("*Kirkland Sergeants*"). Judge Lasker determined that the Sergeants exam did indeed discriminate against minorities and ordered DOCS to develop new selection procedures to be validated by means of an empirical, criterion-related study. Between 1974 and 1979, DOCS attempted to comply with Judge Lasker's order and put forth its proposal for new selection procedures. The new proposal, which called for the addition of 250 points to the test scores of minority candidates,[6] was held by Judge Lasker to have satisfied the requirements established by the Second Circuit in their affirmance of his

6. The new testing procedure entailed two distinct parts. First, it called for a written test designed to assess verbal skills. Second, performance ratings were to be made by the candidates' departmental superiors. After administration of the written test, it was discovered that minority scores were, on the average, somewhat lower than those of non-minority candidates. Accordingly, CSC rescored the tests by adding 250 points to the minority applicants' scores. *See Kirkland v. New York State Department of Correctional Services*, 552 F.Supp. 667, 669 (S.D.N.Y.1982), *aff'd*, 711 F.2d 1117 (2d Cir.1983).

initial order. *Kirkland v. New York State Department of Correctional Services*, 482 F.Supp. 1179 (S.D.N.Y.), *aff'd*, 628 F.2d 796 (2d Cir.1980), *cert. denied*, 450 U.S. 980, 101 S.Ct. 1515, 67 L.Ed.2d 815 (1981).

In January of 1982, minority Correction Sergeants lodged a further challenge to DOCS' procedures, claiming that the promotional examination for the position of Correction Lieutenant was racially discriminatory against blacks and Hispanics. On August 20, 1982, the parties to the suit submitted proposals of settlement to Judge Griesa of the Southern District of New York. On November 9, 1982, Judge Griesa approved the proposed settlement. *Kirkland v. New York State Department of Correctional Services*, 552 F.Supp. 667 (S.D. N.Y.1982), *aff'd*, 711 F.2d 1117 (2d Cir.1983). The settlement agreement provided measures both to eradicate all disproportionate racial impact resulting from administration of the Lieutenants examination as well as provisions for the development and administration of new selection procedures for promotion to Correction Lieutenant and

Correction Captain. Holding that "voluntary compliance is a preferred means of achieving Title VII's goal of eliminating employment discrimination," the Second Circuit affirmed Judge Griesa's approval of the settlement agreement. *Kirkland v. New York State Department of Correctional Services,* 711 F.2d 1117, 1128 (2d Cir.1983) ("*Kirkland Lieutenants*").

Against this background, and apparently in an effort to forestall a third *Kirkland* -type suit with respect to the Captains examination, CSC took it upon itself to adjust minority candidates' scores upward, thereby eliminating what it perceived to be the adverse racial impact of the Captains test. It is this anticipatory defensive maneuver which serves as the basis for the instant action.

The Civil Service Framework

In New York, the State Civil Service Commission is charged with administration of the state's civil service system. N.Y.Civ.

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Serv.Law § 6 (McKinney 1983). The procedures regarding civil service examinations and appointments are greatly detailed and are set forth in the Civil Service Law. The overriding theme of the civil service system expresses the fundamental purpose that appointments be based on merit. *E.g.*, N.Y. Const. art. V, § 6 ("Appointments and promotions in the civil service of the state and all of the civil divisions thereof . . . shall be made according to merit and fitness to be ascertained, so far as practicable, by examination which, as far as practicable, shall be competitive . . . ."); .N.Y.Civ.Serv.Law § 52(2) (McKinney 1983) ("Promotion shall be based on merit and fitness as determined by examination . . . ."); *Matter of Andresen v. Rice*, 277 N.Y. 271, 14 N.E.2d 65 (1938) ("The fundamental purpose running through our civil service provisions is that, so far as practicable, positions in the State service shall be filled by competitive examinations"). Section 95 of the Civil Service Law provides that:

> It shall be the duty of all officers of the state of New York . . . to conform to and

> comply with and to aid in all proper ways in carrying into effect the provisions of this chapter, and the rules and regulations prescribed thereunder. No officer or officers having the power of appointment or employment shall appoint or select any person for appointment, employment, promotion or reinstatement except in accordance with the provisions of this chapter and the rules and regulations established thereunder.

N.Y.Civ.Serv.Law § 95 (McKinney 1983).

[1] With respect to examinations, § 66.2 of the Rules and Regulations of the Department of Civil Service provides that "[n]o candidate shall be passed in an examination or have his name entered upon an eligible list who fails to attain a passing mark in the examination as a whole . . . ." While the Civil Service Commission is thus constrained to act within the confines of its legislative mandate, a fragile balance is brought to bear when that mandate is alleged to interfere with citizens' constitutional rights. More specifically, if strict compliance with the mandated merit procedures were to lead to illegal racial discrimi-

nation under, for example, a Title VII analysis, then the state law must yield to this overriding federal constitutional consideration. *See Guardians Association of the New York City Police Department, Inc. v. Civil Service Commission*, 630 F.2d 79, 104–05 (2d Cir.1980), *cert. denied*, 452 U.S. 940, 101 S.Ct. 3083, 69 L.Ed.2d 954 (1981). In this light, a consideration of the propriety of defendants' remedial actions will be undertaken.

The Examination

[2] Examination No. 37–526 was administered on January 30, 1982. After the candidates' raw scores had been compiled, CSC reviewed the test scores to determine whether the examination had an adverse impact upon racial or ethnic minorities. Based on the raw scores, 119 out of 243 (forty-nine percent) non-minority candidates passed the examination. Only eight out of thirty-two (twenty-five percent) minority candidates achieved a passing score. Applying the four-fifths rule of the EEOC Uniform Guidelines on Employee Selection,

29 C.F.R. § 1607.4[D],[7] CSC concluded that there was in fact an adverse impact upon minority candidates. Accordingly, in order to effect prospective compliance with Title VII, CSC determined to adjust minority scores upward. The statistical methodology employed by CSC to effect the adjustment was that of "separate frequency distribution." Essentially, the process entails preparing separate distributions of minority candidates in score order and nonminority

7. The four-fifths rule essentially provides that a selection rate for any race, sex or ethnic group that is less than four-fifths (80%) of the rate for the group with the highest selection rate will be regarded as evidence of adverse impact. For example, in the case of the Captains exam, the non-minority pass rate was approximately 50%, while the minority pass rate was only 25%. Twenty-five percent is considerably less than 80% of 50%. The opinions of the Second Circuit consistently have held that adverse impact is demonstrated by violation of the four-fifths rule. *E.g., Teal v. Connecticut*, 645 F.2d 133, 137 (2d Cir.1981), *aff'd*, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982); *Guardians Association of the New York City Police Department, Inc. v. Civil Service Commission*, 630 F.2d 79, 88 (2nd Cir.1980), *cert. denied*, 452 U.S. 940, 101 S.Ct. 3083, 69 L.Ed.2d 954 (1981).

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candidates in score order, and equating the scores of each group by normalizing the separate frequency distribution. The result of the adjustment was to increase the number of minorities who passed the exam to sixteen out of thirty-two (fifty percent) compared with the raw score pass rate of eight out of thirty-two (twenty-five percent).[8]

8. It is interesting to note defendants' contention that since the adjustment only added the names of eight minorities to the eligible list and did not result in an attendant "bumping" of eight non-minorities from the list, that the effect with respect to non-minorities was an innocuous one. This is simply not correct. Since appointments to Captains positions are made beginning with those at the top of the eligible list, a shuffling of the order of the list creates the adverse impact. That is to say, as more promotions are made further down the list, a displacement of non-minorities by minorities will serve either to delay a non-minority's promotion or to bar it entirely when all the positions have been filled. *See* N.Y.Civ. Serv.Law § 61.1 (McKinney 1983) ("Appointment or promotion from an eligible list to a position in the competitive class shall be made by the selection of one of the three persons certified by the appropriate civil service commission as standing highest on such eligible list

(footnote continued on following page)

Plaintiffs contend that an adjustment made solely on the basis of race violated their constitutional rights by affording minorities a "racial bonus." Defendants, on the other hand, claim that the use of the separate frequency distribution was necessary in order to comply with Title VII. In other words, to the extent defendants perceived adverse racial impact, they now claim to be entitled to a prospective compliance defense under Title VII.

III

On motions for summary judgment, it is well established that the court's function "is not to resolve issues of fact but to determine whether any material factual issues are raised after resolving all questionable inferences in favor of the party against whom the judgment is sought. Only if no material factual issues exist may summary judgment be granted." *United States v. Matheson*, 532 F.2d 809, 813 (2d Cir.), *cert.*

(footnote continued)

who are willing to accept such appointment or promotion"); Defendants' answer, ¶ 21 ("admit that Commissioner Coughlin has, in the past, made appointments from eligible lists in the order in which names appear on said lists").

denied, 429 U.S. 823, 97 S.Ct. 75, 50 L.Ed.2d 85 (1976); *see also Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 444–45 (2d Cir.1980); *Heyman v. Commerce & Industry Insurance Co.*, 524 F.2d 1317, 1319 (2d Cir.1975). Although the moving party bears the burden of clearly establishing the non-existence of any issue of fact that is material to a judgment in his favor, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157–61, 90 S.Ct. 1598, 1608–10, 26 L.Ed.2d 142 (1970), the party opposing summary judgment must "set forth specific facts showing that there is a genuine issue for trial," in order to defeat the motion. Fed. R.Civ.P. 56(e). It is clear from the discussion which follows that defendants have failed to establish the existence of any disputed fact issues warranting the denial of plaintiffs' motion. More particularly, defendants have come forward with no evidence controverting that which has been proffered by plaintiffs with respect to the impropriety of defendants' actions.

IV

[3] Essentially, plaintiffs' complaint raises alleged violations of Title VII of the

Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e–17 (1981).[9] There is no question that

9. Title VII provides:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e 2(a).

Plaintiffs' complaint also asserts, pursuant to 42 U.S.C. § 1983, a violation of their fourteenth amendment rights under the United States Constitution, as well as violations of 42 U.S.C. § 1981 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Both the fourteenth amendment and the § 1981 claims are not maintainable, as plaintiffs have failed to prove the necessary element of discriminatory intent. *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375, 382–391, 102 S.Ct. 3141, 3146–50, 73 L.Ed.2d 835 (1982) (§ 1981); *Washington v. Davis*, 426 U.S. 229,

(footnote continued on following page)

(footnote continued)

239–41, 96 S.Ct. 2040, 2047–48, 48 L.Ed.2d 597 (1376) (fourteenth amendment). The Title VI claim must fail as well since defendants disavow the receipt of any federal funds, Defendants' answer, ¶ 25, and plaintiffs have proffered no evidence to the contrary. *See Association Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256, 276 (2d Cir. 1981) ("for a claimant to recover under Title VI against an employer for discriminatory employment practices, a threshold requirement is that the employer be the recipient of federal funds aimed primarily at providing employment"), *cert. denied*, 455 U.S. 988, 102 S.Ct. 1611, 71 L.Ed.2d 847 (1982).

Plaintiffs' complaint also raises violations of various provisions of state law, including article V, § 6 of the New York State Constitution; sections 52 and 61 of the Civil Service Law of the State of New York; Rules 3.6, 4.2, and 66.2 of the Rules and Regulations of the Department of Civil Service; and section 296.1(a) of the New York State Human Rights Law (N.Y. Exec.Law § 296.1(a) (McKinney 1982)). Because this Court concludes that defendants' actions have violated federal law and that the federal remedy will be a complete one, we need not reach the state law questions. *See Jong-Yul Lim v. International Institute of Metropolitan Detroit, Inc.*, 510 F.Supp. 722, 725 (E.D. Mich.1981) ("The limited grant of relief under

(footnote continued on following page)

Title VII prohibits racial discrimination against whites as well as non-whites. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 279-80, 96 S.Ct. 2574, 2578, 49 L.Ed.2d 493 (1976); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971). "This conclusion is in accord with uncontradicted legislative history to the effect that Title VII was intended to 'cover white men and white women and all Americans,' . . . and create an 'obligation not to discriminate against whites . . . .'" *McDonald v. Santa Fe*, 427 U.S. at 280, 96 S.Ct. at 2578 (quoting 110 Cong.Rec. at 2578 (remarks of Rep. Celler), 7218 (memorandum of Sen. Clark)). It is uncontroverted that defendants effected the score adjustment in favor of minorities solely on the basis of racial considerations. However commendable may have been defendants' motives, e.g., an effort to remedy what was perceived to be a discriminatory pattern against minorities, the guiding legal principles cannot be sidestepped. By its

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[1](footnote continued)

Title VII is an indication of congressional intent to negate the exercise of pendent jurisdiction over the plaintiff's state law claims").

terms, Title VII expressly prohibits the actions undertaken by defendants:

> It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race . . . or . . . to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color . . . or national origin.

42 U.S.C. § 2000e–2(a).

It cannot be, indeed is not, disputed that, by rescoring the examination, defendants succeeded in discriminating against plaintiffs. What is in dispute, and what presents a difficult and rather novel legal question is whether defendants' actions here may be justified in the name of prospective compliance with Title VII. At its most basic level, defendants' argument is

this: Given the defendants' perception of the examination's adverse impact upon minorities and the inevitable prospect of a *Kirkland*-type suit, it was wholly proper to initiate unilateral, remedial action and thereby achieve Title VII compliance vis-a-vis minorities without incurring the expense and disruption of an eventual minority suit. *See* Affidavit of John McKenna, ¶ 17. While defendants' intentions well may have been laudable, *cf. Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n. 14, 101 S.Ct. 993, 998 n. 14, 67 L.Ed.2d 59 (1981) (strong preference for voluntary settlement of Title VII cases); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44, 94 S.Ct. 1011, 1017, 39 L.Ed.2d 147 (1974) (same); *Kirkland Lieutenants*, 711 F.2d at 1128 (same); *Berkman v. City of New York*, 705 F.2d 584, 597 (2d Cir.1983) (same); *Stotts v. Memphis Fire Department*, 679 F.2d 541, 555 (6th Cir. 1982) (Title VII consent decree "may produce more favorable results than more sweeping judicially imposed orders that might risk opposition and resistance. . . .

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Consent decrees also reduce the cost of litigation, engender judicial economy, and vindicate an important societal interest in affirmative action"), *cert. granted,* —— U.S. ——, 103 S.Ct. 2451, 77 L.Ed.2d 1331 (1983), defendants' actions were undertaken without proper attentiveness to settled Title VII law. *See Kirkland Lieutenants,* 711 F.2d at 1132 ("[s]imply stated, the remedies provided by a Title VII settlement, especially those containing race-conscious relief, must be substantially related to the objective of eliminating the alleged instance of discrimination . . ., and must not unnecessarily trammel the interests of affected third parties"); *see also United Steelworkers of America v. Weber,* 443 U.S. 193, 208, 99 S.Ct. 2721, 2729, 61 L.Ed.2d 480 (1979); *Berkman v. City of New York,* 705 F.2d 584, 597 (2d Cir.1983) (district court should normally approve settlement "unless it contains provisions that are unreasonable, unlawful, or against public policy"); *United States v. City of Miami,* 664 F.2d 435, 441 (5th Cir.1981) (en banc) (plurality opinion)

(voluntary Title VII compromise affecting third parties should be approved only if the court is satisfied that the effect on third parties is neither unreasonable nor proscribed); *Setser v. Novack Investment Co.*, 657 F.2d 962, 968 (8th Cir.1981) (en banc) ("The first burden on the employer in a reverse discrimination suit is to produce some evidence that its affirmative action program was a response to a conspicuous racial imbalance in its work force and is remedial. Some indication that the employer has identified a racial imbalance in its work force is necessary to ensure that new forms of invidious discrimination are not approved in the guise of remedial affirmative action . . . ."); *United States v. City of Alexandria*, 614 F.2d 1358, 1366 (5th Cir. 1980).

Plaintiffs do not contend that prospective compliance with Title VII is not in fact a recognized defense to alleged Title VII violations. In *Kirkland Lieutenants*, the Second Circuit expressly noted that "[n]either Title VII nor the Constitution prohibits

compromise agreements implementing race-conscious remedies which are agreed to prior to a judicial determination on the merits." 711 F.2d at 1130; *see also United Steelworkers of America v. Weber*, 443 U.S. 193, 207–08, 99 S.Ct. 2721, 2729, 61 L.Ed.2d 480 (1979); *Setser v. Novack Investment Co.*, 657 F.2d 962, 966–68 (8th Cir.1981) (en banc). *But see Teal v. Connecticut*, 645 F.2d 133, 139 (2d Cir.1981) ("Nor are we persuaded that construing Title VII to invalidate a selection process that includes an affirmative action component to insure non-disparate overall results will frustrate the general objective of achieving racial balance in the workforce. While Title VII may *permit* voluntary affirmative action in some instances, . . . the statute was never intended to be interpreted as an affirmative action device. Indeed, § 703(j) of Title VII expressly provides that Title VII shall not be 'interpreted to *require* any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist' in that respect

in the employer's workforce" (emphasis by the court)), *aff'd*, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982). The issue presently before this Court narrows, therefore, to a determination of the parameters of the prospective compliance defense.

A. Adverse Impact

[4] Relying on the Supreme Court decision in *Weber*, defendants take the position that their actions are insulated from Title VII liability since they only sought to prevent a discriminatory result and not to promote one.[10] *Weber* did in fact sanction affirma-

10. Specifically, defendants argue that rescoring the examination resulted in *no* adverse impact upon any race or ethnic group, Defendants' Memorandum in Support, p. 14, and only modest injury to non-minority candidates, Defendant-Intervenors' Memorandum in Opposition, p. 8, since the 50% non-minority pass rate remained unaffected by the scoring adjustment. What defendants and defendant-intervenors fail to understand, however, is that *individual* non-minorities were indeed injured by the rescoring, despite the fact that the overall non-minority pass rate remained unchanged. *Cf. Connecticut v. Teal*, 457 U.S. 440, 452–56, 102 S.Ct. 2525, 2533–35, 73 L.Ed.2d 130 (1982) (no defense in Title VII action to employer who discriminated against individual minorities that minority class as a whole was represented in non-discriminatory proportions).

tive action aimed at eliminating a pattern of discrimination, as long as the method chosen did not unnecessarily trammel the interests of non-minorities. 443 U.S. at 208, 99 S.Ct. at 2729. Defendants also seek to justify their action by arguing that it was necessary in order to avoid an inevitable *Kirkland*-type suit by minority Correction Lieutenants.[11] In the language of Judge Wisdom of the Fifth Circuit, defendants obviously felt themselves in the unenviable position of being upon a "high tightrope without a net beneath them." *Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216, 230 (5th Cir.1977) (Wisdom, J., dissenting), *rev'd sub nom. United Steelworkers of America v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979). Despite the unfortunate Hobson's choice with

11. Consideration of this identical argument was expressly withheld by the *Weber* Court. 443 U.S. at 209 n. 9, 99 S.Ct. at 2730 n. 9. The Court did suggest, however, that "the freedom of any employer to undertake race-conscious affirmative action [does not] depend . . . on whether or not his effort is motivated by fear of liability under Title VII." Id. at n. 8, 99 S.Ct. at n. 8.

which defendants perceived themselves confronted, this Court is unable to conclude other than that defendants' chosen action has unlawfully discriminated against these plaintiffs. This conclusion is reached on the basis of a number of serious flaws both in defendants' approach to the problem and in the underlying assumptions upon which they have proceeded.

The most fundamental problem with defendants' remedial action is to be found in the very premise upon which they proceeded, namely, an ostensibly conclusive finding of adverse impact. It is well established that when an affirmative action "settlement contains race-conscious relief affecting third parties, some well substantiated claim of racial discrimination against the plaintiff class is necessary 'to ensure that new forms of invidious discrimination are not approved in the guise of [race-conscious remedies].'" *Kirkland Lieutenants*, 711 F.2d at 1130 (quoting *Setser v. Novack Investment Co.*, 657 F.2d 962, 968 (8th Cir. 1981) (en banc)); *see also Fullilove v. Klutznick*, 448 U.S. 448, 497–98, 100 S.Ct. 2758,

2784, 65 L.Ed.2d 902 (1980) ("this Court has never approved race-conscious remedies absent judicial, administrative, or legislative findings of constitutional or statutory violations"); *Regents of the University of California v. Bakke*, 438 U.S. 265, 307, 98 S.Ct. 2733, 2757, 57 L.Ed.2d 750 (1978) (same); *Valentine v. Smith*, 654 F.2d 503, 508-09 (8th Cir.), *cert. denied*, 454 U.S. 1124, 102 S.Ct. 972, 71 L.Ed.2d 111 (1981); *Guardians Association of the New York City Police Department, Inc. v. Civil Service Commission*, 630 F.2d 79, 108 (2d Cir.1980), *cert. denied*, 452 U.S. 940, 101 S.Ct. 3083, 69 L.Ed.2d 954 (1981); *Vulcan Society of the New York City Fire Department, Inc. v. City of New York*, 96 F.R.D. 626, 629 (S.D. N.Y.1983). Accordingly, this Court must consider on precisely what basis defendants founded their determination of adverse minority impact. The best summary of the factors taken into account is provided in the Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment:

> [T]he basis for the decision to use differential scoring was the adverse impact of the written test, the litigation history of examinations for Corrections supervisory security titles, the lack of any empirical data indicating that minority and non-minority candidates for Captain would not perform equally well on the job, and the availability of data regarding the job performance of minorities and non-minorities in the two supervisory titles directly below Correction Captain.

Defendants' Memorandum in Opposition, p. 5; *see also* Defendants' Memorandum of Law in Support of their Motion for Summary Judgment, pp. 3–11; Affidavit of John McKenna, ¶¶ 3–16. None of these factors, either individually or collectively, is sufficient to support a proper finding of adverse impact.

The Test Itself

[5] In terms of the examination results, defendants contend that the disparate impact on minority applicants was manifest after application of the four-fifths rule. A good deal of reliance is placed by defendants on

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the value of a statistical showing of adverse impact. It is of course true that a statistical showing of adverse impact creates a presumption of Title VII discrimination, *Kirkland Lieutenants*, 711 F.2d at 1130; *Guardians Association of the New York City Police Department, Inc. v. Civil Service Commission*, 630 F.2d 79, 88 (2d Cir.1980), *cert. denied*, 452 U.S. 940, 101 S.Ct. 3083, 69 L.Ed.2d 954 (1981), and, in appropriate circumstances, may even serve to establish a prima facie case of employment discrimination. *See New York City Transit Authority v. Beazer*, 440 U.S. 568, 584, 99 S.Ct. 1355, 1365, 59 L.Ed.2d 587 (1979); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396 (1977); *Castaneda v. Partida*, 430 U.S. 482, 496 & n. 17, 97 S.Ct. 1272, 1281 & n. 17, 51 L.Ed.2d 498 (1977); *Kirkland Lieutenants*, 711 F.2d at 1130. Nonetheless, our consideration of defendants' statistics must proceed with caution, heeding the Supreme Court's admonition that "statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence,

they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396 (1977); *see, e.g., Ingram v. Madison Square Garden Center, Inc.*, 709 F.2d 807, 810 (2d Cir.1983) ("Statistical evidence of discrimination based on but a few numbers is not, standing alone, compelling evidence of wrongdoing"); *Adams v. Reed*, 567 F.2d 1283, 1287 (5th Cir.1978) (too small a sample undercuts value of statistical evidence); *Morita v. Southern California Permanente Medical Group*, 541 F.2d 217, 219–20 (9th Cir.1976) (same), *cert. denied*, 429 U.S. 1050, 97 S.Ct. 761, 50 L.Ed.2d 765 (1977); *Harper v. Trans World Airlines, Inc.*, 525 F.2d 409, 412 (8th Cir.1975) ("statistical evidence derived from an extremely small universe . . . has little predictive value and must be disregarded"); Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4[D] (1982) (with respect to four-fifths rule, "[g]reater differences in selection rate may not constitute adverse impact where the differences are

based on small numbers and are not statistically significant . . . ."). While this Court questions the statistical sufficiency of defendants' sample size, it is not prepared to hold that a pool consisting of thirty-two minorities and 240 or so non-minorities, is, as a matter of law, an inadequate number from which to draw statistical inferences.[12] Instead, the Court relies on the record presented, including the uncontroverted findings of plaintiffs' statistical expert, Dr. Michael Kavanagh, submitted in support of plaintiffs' motion for summary judgment.

Dr. Kavanagh's report reads in part as follows:

> I also question the defendants' initial decision to adjust the raw scores on a racial/ethnic basis. In forming this opinion, I carefully examined: (1) the raw

12. We do note, however, that prior litigation involving the Department of Corrections involved statistical findings of adverse impact based on much larger sample sizes. *See Kirkland Lieutenants*, 711 F.2d at 1122 (739 candidates; 169 minority, 570 non-minority); *Kirkland Sergeants*, 374 F.Supp. at 1365 (1383 candidates; 1264 non-minority, 119 minority).

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scores by racial/ethnic background, by seniority, and by type of previous experience; (2) the job descriptions for Correction Officer, Sergeant, Lieutenant and Captain as well as the job descriptions for the Narcotic Correction Officer Series; (3) two announcements for the competitive promotion examination for Correction Captain issued 11/1/74 and 12/18/81; and (4) copies of the Promotion Examination Application for all candidates who were placed on the eligible list resulting from Examination 37–526 including the blacks and Hispanics who failed Examination 37–526 but were given adjusted passing grades. I also examined the current professional literature on personnel selection, with particular reference to racial/ethnic differences in employment testing and employment decisions. . . .

From the frequency distributions of scores on Examination 37–526, it is clear that the score distributions for minorities and non-minorities differ statistically. *It is premature and inconsistent with currently accepted professional standards and practices literature . . . to conclude,*

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as the defendants have, that this was the result of the "disproportionate racial/ethnic impact of Examination 37-526."

. . . .

The number of minorities on eligible list 37-526 is small. Those minorities whose only supervisory experience is ODAS experience constitute a substantial segment of the total list of minorities and as to that segment, I can state with reasonable professional certainty that it is more likely that the differences in the score distributions are a result of differences in prior experience rather than of racial/ethnic background differences. It is my opinion that under such circumstances, since Examination 37-526 is a professionally developed, job-related ability test which evaluated the merit and fitness of the candidates for the position of Correction Captain,[13] that there is insufficient foun-

13. To the extent Examination No. 37-526 is considered a professionally developed, job-related ability test, it is important to note that Title VII expressly recognizes such a test's use as a defense to any Title VII action. Specifically, § 2000e-2(h) provides:

(footnote continued on following page)

> dation for concluding that the lower results for minorities was [sic] due to their racial/ethnic background and with the numbers and facts involved here, such a conclusion by defendants is not justified.

Kavanagh affidavit, ¶¶ O, P, & T (emphasis added). Taking Dr. Kavanagh's findings as true, since defendants have failed to offer proof to the contrary, the statistics relied on by defendants simply were not a sufficient basis upon which to predicate their determination of adverse impact requiring remedial measures.

The Litigation History of Corrections Department Examinations

Defendants also claim to have relied on what they characterize as an empirically established pattern of discriminatory impact as evidenced through the course of

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> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test its administration or action upon the results is not designed, intended or used to discriminate because of race ....

prior Corrections Department litigation. Although the outcomes in both *Kirkland Sergeants* and *Kirkland Lieutenants* suggest the unfortunate fact that, at least in the past, DOCS' promotional procedures were not wholly free of any discriminatory impact, that fact alone does not, as defendants contend, impel the conclusion that the Captains exam similarly was tainted. However lamentable may have been defendants' promotional practices in the past,[14] it is not axiomatic that the present exam suffered equal infirmities, and defendants offer no basis for this Court to draw the same inferences that defendants have drawn from this past examination history. *Cf. Stewart v. CPC International, Inc.*, 679 F.2d 117, 121 (7th Cir.1982) ("At least one discriminatory act must have occurred within the charge-filing period. Discriminatory acts that occurred prior to this period constitute rele-

14. It is interesting at this point to note that the settlement agreement approved in *Kirkland Lieutenants* contains express disclaimers on the part of DOCS of any admission of unlawful discrimination, although DOCS did not dispute the facts showing adverse impact. *See* Stipulation of Settlement, art. I, ¶¶ 5 & 12. *But cf. Kirkland Lieutenants*, 711 F.2d at 1131 n. 16.

vant evidence of a continuing practice, and may help to demonstrate the employer's discriminatory intent; and they will of course be used to determine the extent of the remedy that is in order.... But the prior discriminatory acts do not come into play at all unless the plaintiff can show in the first place that the discrimination is 'presently' continuing"); *Fisher v. Procter & Gamble Manufacturing Co.*, 613 F.2d 527, 540 (5th Cir.1980) (same). This factor, too, provided an insufficient foundation for defendants' finding of discrimination.

Data Regarding Job Performance

[6] The final factor relied upon by defendants in their decision to implement the scoring adjustment relates to their attempts to evaluate the job performance of minorities vis-a-vis non-minorities. Based on a variety of considerations, defendants felt comfortable in concluding that the disparities in test scores were in no way an indication of these minority candidates' inherent inabilities to perform in the same capacity as these non-

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minority applicants.[15] After reviewing the manner in which defendants arrived at this

15. The issue of job-relatedness is a crucial one in any Title VII inquiry. In the standard Title VII testing case, a defendant effectively may rebut a plaintiff's prima facie case of discrimination by proving that the test was "legitimately job-related." *Guardians Association of the New York City Police Department, Inc. v. Civil Service Commission*, 630 F.2d 79, 88 (2d Cir. 1980), *cert. denied*, 452 U.S. 940, 101 S.Ct. 3083, 69 L.Ed.2d 954 (1981); *Kirkland Lieutenants*, 711 F.2d at 1130; *see Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253–54, 101 S.Ct. 1089, 1093–94, 67 L.Ed.2d 207 (1981); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S.Ct. 2362, 2372, 45 L.Ed.2d 280 (1975); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). In its simplest terms, job-relatedness here refers to whether or not the test accurately selected applicants who would be better Correction Captains. If that proved to be the case, then defendants' conclusions of adverse racial impact would not have required remedial action since job-relatedness would have provided a defense to a Title VII action brought by minorities. That is to say, if the Captains exam was in fact job-related, defendants' were not justified in engaging in any score adjustment since the adverse impact would have been rendered academic under a Title VII analysis.

conclusion, and the uncontroverted evidence which has been proffered by plaintiffs, this Court is unpersuaded as to the validity of defendants' conclusions.

Essentially, defendants point to "the lack of any empirical data indicating that minority and non-minority candidates for Captain would not perform equally well on the job, and the availability of data regarding the job performance of minorities and non-minorities in the two supervisory titles directly below Correction Captain." Defendants' Memorandum in Opposition, p. 5. Significantly, the affidavit of John McKenna, Director of the Division of Examinations and Staffing Services, New York State Department of Civil Service, acknowledges that:

> No criterion measure for evaluating the job performance of minorities and non-minorities in the position of Correction Captain, as it exists in the Department of Correctional Services has been developed. It was not possible to develop such a measure, prior to administration of Examination No. 37-526, due to the small number of permanent incumbents (13) in the title. Even if a criterion measure

were available, it would be impossible to apply, because too few appointments are made from an eligible list based on any one examination for Correction Captain to provide significant evidence of the relationship between job performance and test performance.

McKenna affidavit, ¶ 8. In the absence of actual data concerning Captain positions, defendants felt comfortable in relying on what best can be described as an intuition born of experience. In other words, defendants generalized from data and findings regarding other security titles with DOCS to the conclusion that these findings applied equally to the Captain positions. The affidavit of John McKenna continued:

To the extent that data is available to the Department concerning the job performance of minorities and non-minorities serving in Corrections security titles, that data indicates that there are no statistically significant differences in job performance between the groups. It has also been this Department's experience that written tests for Corrections security titles have tended to result in adverse racial impact.

McKenna affidavit, ¶ 9.

In concluding that there is no significant difference between job performance by minorities and job performance by non-minorities, defendants essentially relied upon two sets of data—first, the results of a criterion-validation study performed for Correction Sergeants as part of the relief ordered by Judge Lasker in *Kirkland Sergeants*, and second, a random sampling of performance evaluations for candidates for the most recent Correction Lieutenant examination, both of which showed no statistically significant differences in job performance between minority and non-minority candidates. Defendants' Memorandum in Support of their Motion for Summary Judgment, p. 10; McKenna affidavit, ¶¶ 10 & 11. For the reasons which follow, defendants' reliance on these data was misplaced.

With respect to the criterion validation study, defendants point to *Kirkland Sergeants* and the study results which indicated that minorities characteristically performed less well on the final selection procedures than non-minorities, but that this difference was not reflected in differences

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in job performance. *See Kirkland Sergeants*, 482 F.Supp. 1179 (S.D.N.Y.), *aff'd*, 628 F.2d 796 (2d Cir.1980), *cert. denied*, 450 U.S. 980, 101 S.Ct. 1515, 67 L.Ed.2d 815 (1981). With respect to the random sampling of performance evaluations for candidates for the Lieutenants exam, defendants discerned a similar pattern. Once again, the uncontroverted report of plaintiffs' expert, Dr. Michael Kavanagh, proves determinative here. The conclusions of Dr. Kavanagh are excerpted at length:

> The most obvious error made by the defendants in their analysis performed to justify adjusting the test scores of minorities and non-minorities is the use of the criterion-validation study completed for the Correction Sergeant Examination and the study that reviewed the performance ratings of forty-one individuals who took and passed the examination for Correction Lieutenants.
>
> As an initial matter, the results obtained from studies done on Sergeants or Lieutenants cannot be used to justify decisions on a test for Correction Captains.

Although these jobs are all in a promotional series, they are different jobs, as the job descriptions reveal. Both the Uniform EEOC Guidelines on Employee Selection Procedures and The Principles for the Validation and Use of Personnel Selection Procedures state clearly that representativeness of the sample is critical for justifying criterion-validation for a selection test. After my examination of the job descriptions for Correction Sergeant, Correction Lieutenant, and Correction Captain, I have concluded, with reasonable professional certainty, that there are important differences between these positions and that generalizing results from studies done on the different jobs of Correction Sergeants and Lieutenants does not provide a valid foundation to justify the adjustment of scores on an examination for Correction Captains. Clearly, a criterion-validation study using Correction Captains as the appropriate sample would need to be done prior to adjusting test scores on Examination 37–526, and the method used by the State is not acceptable in light of professional guidelines and standards. There are also

fatal technical deficiencies in the other study used by the State.

My review of the study of the performance ratings of forty-one Correction Lieutenants who passed Lieutenants Examination 36-808 reveals serious and disqualifying defects. First, according to the data from this study, there were only forty (not forty-one) individuals who were rated, eleven minorities and twenty nine non-minorities. This is much too small a sample from which to draw any statistical inferences regarding the differences in job performance ratings of minorities and non-minorities who had passed the qualifying examination for Correction Lieutenant. Furthermore, there are multiple data points (multiple performance ratings) for some individuals in this study and single performance ratings for others. This lack of independence of data points and inconsistency of observations of individuals in the study makes [sic] any statistical analyses of this data unreliable and speculative. I can state with reasonable professional certainty that the random sampling that had

been done of the performance ratings of Correction Lieutenants which the defendants claim "showed there was no difference in performance between minorities and non-minorities," is so inadequate and so technically deficient and speculative that no reliable statistical conclusions can be drawn therefrom and that statistical conclusions drawn therefrom by the State are not valid.[16]

16. The Kavanagh affidavit points to an additional reason which explains away any inference of actionable adverse racial impact. Based on the affidavit, plaintiffs claim the reason for the disparate performance of minorities vis-a-vis non-minorities relates to the experience the minority candidates brought with them to the examination. Apparently, a number of minority candidates qualified to take the Captains exam on the basis of their supervisory experience within the Office of Drug Abuse Services ("ODAS"), in contrast to most plaintiffs, whose qualifying experience was in the form of Corrections Department service. In evaluating this factor, Dr. Kavanagh noted:

> Based on my careful examination of the job descriptions for Corrections Officers, Correction Sergeants, Correction Lieutenants and Correction Captains, it is apparent to me that these positions form a separate career path.

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(footnote continued)

The emphasis in the Corrections path is insuring that security is maintained for convicted felons....

The Narcotic Correction Officer Series also forms a separate sequential career path. In contrast to the corrections career path, the ODAS career path emphasis is on "treatment" and not security....

Based on my examination of these job descriptions, it is apparent to me that the two separate career paths result in significantly different job experiences, in light of which one would expect that those candidates whose sole qualifying supervisory experience was with ODAS would not do as well on a Correction series promotion test as those with the typical correction career progression. My examination indicates that this is born [sic] out and that a large number of candidates whose sole qualifying supervisory experience is in ODAS are black or Hispanic. Kavanagh affidavit, ¶¶ Q S.

On the basis of what plaintiffs allege to be the limited data provided by defendants, it appears that at least six of eleven candidates with ODAS experience only were black or Hispanic. Defendants' response is essentially twofold. First, defendants suggest that such an argument is irrelevant as a matter of law, since the reasons for adverse impact do not affect the question of whether a prima facie case of discrimination has been established. While it is

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true that in constructing a prima facie case, the reasons for adverse impact are indeed irrelevant, *see Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433–36, 91 S.Ct. 849, 854–56, 28 L.Ed.2d 158 (1971), defendants neglect to take account of the importance such reasons have in *rebutting* the prima facie case. *Kirkland Lieutenants*, 711 F.2d at 1132 (lack of experience may be relevant to question of a test's job-validity). To the extent the prima facie case may be rebutted by such a showing, the underlying explanation for disparate impact assumes great importance.

Next, defendants argue that plaintiffs' argument is factually incorrect, and suggest that prior case law has established that differences in responsibility between ODAS supervisory officers and supervisory corrections officers are negligible. Defendants cite *Stokes v. New York State Department of Correctional Services*, 569 F.Supp. 918 (S.D.N.Y.1982), and *Kirkland Lieutenants*, 711 F.2d at 1132 which cites *Stokes* with approval. While *Stokes* did indeed find only negligible differences in the responsibilities and performance capabilities between some ODAS and DOCS personnel, defendants' reading of that opinion is too broad when applied outside the factual context of that case. Significantly, *Stokes* dealt only with the comparable performance of Correction Officers,

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Kavanagh affidavit, ¶¶ C–E.

On the basis of the foregoing, it is clear to this Court that defendants' conclusions of adverse impact were fundamentally unfounded. Because defendants acknowledge the bases upon which their finding of adverse impact was predicated, and have indicated that the calculus employed in reaching that determination was the sole means available, summary judgment here seems particularly appropriate. There is simply no disputed issue of material fact concerning what this Court holds to be an unsupported finding of adverse impact. Defendants' evidence fails to establish the existence of any material fact with respect to their finding of adverse impact.

(footnote continued)

Sergeants, and Lieutenants. There was no finding that ODAS Officers were suited to jobs as Correction Captains. It well may be that the lower echelon positions within DOCS and ODAS are entirely interchangeable with no noticeable diminution of performance. It does not, however, necessarily follow that the ODAS experience truly "qualified" or prepared ODAS Officers for the Captain's examination. *See* Kavanagh affidavit, ¶¶ Q–T.

B. Failure to Consider Rebuttal of the Prima Facie Case

[7] Assuming, *arguendo*, defendants were confronted with a legitimate showing of adverse impact, a more serious problem is presented by the manner in which they proceeded to treat that showing. In short, contrary to settled Title VII law, defendants arbitrarily and unilaterally transformed what they perceived to be a prima facie showing of a Title VII violation into a *conclusive* finding of illegal discrimination, without properly considering or permitting the possibility of, or opportunity for, rebuttal. *Cf. Furnco Construction Corp. v. Waters*, 438 U.S. 567, 576, 578–80, 98 S.Ct. 2943, 2950–51, 57 L.Ed.2d 957 (1978) ("We think the Court of Appeals went awry, however, in apparently equating a prima facie showing under McDonnell Douglas with an ultimate finding of fact as to discriminatory refusal to hire under Title VII; the two are quite different. . . . A McDonnell Douglas prima facie showing is not the equivalent of a factual finding of discrimination. . . . Rather, it is simply proof of actions taken by the employer from which

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we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations . . . .").

Defendants place a good deal of reliance on the recent decision in *Kirkland Lieutenants*, and steadfastly adhere to the view that the holding in that case wholly vindicates, indeed, compels, the remedial measures which were instituted here. This Court concludes, however, that defendants' attempt to enlarge the *Kirkland Lieutenants* holding to fit the facts presented here represents an unreasonable and omissive reading of that opinion.

Initially, it is important to note that *Kirkland Lieutenants* involved approval of a settlement agreement which had been entered into after arms length bargaining between the parties. The primary holding of the Second Circuit was that such a settlement properly might be approved solely upon a finding that a prima facie case of discrimination had been established. The court rejected the argument that there also

must be a judicial determination that the challenged examination was not job-related. 711 F.2d at 1129-30. Specifically, the court noted:

> [B]ecause a judicial finding of unlawful discrimination under Title VII allowing the imposition of race-conscious remedies can be made on the showing of a *prima facie* case *when the defendant fails to rebut the case,* we think that an unrebutted *prima facie* case is sufficient to serve as a proper basis for a settlement containing race-conscious remedies when the defendant chooses to enter into a compromise.

711 F.2d at 1131 (emphasis added). That holding, however, is not dispositive of the issue here. First, it is clear that the present case does not involve any type of settlement agreement with the attendant bargaining between the parties. Second, and more importantly, *Kirkland Lieutenants* did not, as defendants would have this Court believe, eliminate the defensive option of rebutting the prima facie case. Rather, the opinion held only that an unrebutted prima facie case was a sufficient predicate for a voluntary compromise. Presumably, were the defendants in *Kirkland*

Lieutenants able to rebut the prima facie case they faced, there ultimately would have been no liability on their part. The compromise was no doubt prompted by the fact that defendants there felt themselves unable properly to rebut the prima facie case. The present situation is wholly different.

Here, plaintiffs never were afforded the chance to rebut the prima facie case these defendants perceived they faced in the context of an inevitable *Kirkland*-type suit. Concomitantly, defendants too would have the opportunity to rebut the prima facie case in the *Kirkland*-type action which they envision as flowing inexorably from a decision not to adjust test scores. Instead, however, defendants neglected to address adequately the rebuttal possibilities, and failed to consider the likelihood of their success. In other words, defendants, in enacting race-conscious remedies, acted only on the basis of what they perceived to be a prima facie case and gave inadequate consideration to the possibility that such a prima facie case could have been rebutted. Plaintiffs here have demonstrated that re-

buttal was indeed likely. Because defendants acted without taking into account the full learning of Title VII law, their decision to effect race-conscious relief was improvidently made. Voluntary compliance with Title VII cannot be approved where the decision to effect perceived compliance with Title VII is arrived at without considering rebuttal explanations of job-relatedness for discriminatory impact.

The holding here is well in accord with that in *Kirkland Lieutenants*. It is not suggested that a judicial determination of non-job-relatedness must sanctify any particular compliance plan. Outside the scope of settlement agreements, however, a prerequisite to implementation of race-conscious remedies is establishment of a prima facie case of discrimination *and* thorough consideration of whether that case effectively may be rebutted. To proceed with remedial relief without properly having evaluated the possibility of rebuttal would be to ignore the clear and established mandate of Title VII law. When non-judicial entities seek to affect the legal rights of

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aggrieved parties, it is only proper that the basis for any such action conforms to the standards that would govern any similar judicial resolution. To allow defendants here to advance a Title VII framework wholly of their own design would work substantial injury upon the carefully developed history of Title VII protection.

Defendants have acknowledged that, in the main, they did not, indeed, could not, properly consider job relatedness after determining the presence of adverse impact. *See* McKenna affidavit, ¶¶ 8–11, 14, 17, & 19. Because there is no factual issue as to whether rebuttal evidence properly was considered, summary judgment here is warranted.

C. Methodological Problems

[8] Defendants' resolution of what was perceived to be the discriminatory problems with Examination No. 37–526, suffers from one final infirmity. Even assuming the propriety of the need for defendants' actions in remedying the alleged discriminatory impact of DOCS' promotional procedures, the method by which defendants

chose to effect their remedy was itself fundamentally flawed.

The problem with defendants' approach may be viewed on at least two levels. Initially, consideration is directed to the scope of defendants' proposed cure. The statistics which led defendants to a finding of adverse impact consisted of an examination pass rate of approximately fifty percent for non-minorities and approximately twenty-five percent for minorities. More specifically, of thirty-two minorities, only eight succeeded in passing the exam. Of the thirty-two minorities, twenty-eight were black and four were Hispanic. Of the four Hispanics, two passed the exam and two failed, a pass rate of fifty percent. Admittedly, the sample pool of Hispanics is too small to allow any statistically meaningful inferences. Nonetheless, in adjusting minority scores, Hispanics unnecessarily were included in the group whose scores were inflated artificially by defendants' process. Clearly, there was no justification for making any change in Hispanic candidates' test scores; there was simply no statistical evidence of discriminatory impact on this

group of candidates. In increasing the scores of these candidates without justification in the form of adverse impact findings, defendants' actions were improper. *See Kirkland Lieutenants,* 711 F.2d at 1130 ("When the settlement contains race-conscious relief affecting third parties, some well substantiated claim of racial discrimination against the plaintiff class is necessary 'to ensure that new forms of invidious discrimination are not approved in the guise of [race-conscious remedies]' ") (quoting *Setser v. Novack Investment Co.,* 657 F.2d 962, 968 (8th Cir.1981) (en banc)). "Simply stated, the remedies provided by a Title VII settlement, especially those containing race-conscious relief, must be substantially related to the objective of eliminating the alleged instance of discrimination ....". *Kirkland Lieutenants,* 711 F.2d at 1132; *see also Stotts v. Memphis Fire Department,* 679 F.2d 541, 553 (6th Cir.1982), *cert. granted,* — U.S. ——, 103 S.Ct. 2451, 77 L.Ed.2d 1331 (1983); *Setser v. Novack Investment Co.,* 657 F.2d 962, 968 (8th Cir. 1981) (en banc) ("The second burden on the employer in a reverse discrimination suit is

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to produce some evidence that its affirmative action plan is reasonably related to the plan's remedial purpose. The goals and timetables for the program should be reasonably related to such considerations as the racial imbalance of the work force, the availability of qualified applicants, and the number of employment opportunities available ...." (footnote omitted)); *Valentine v. Smith*, 654 F.2d 503, 510 (8th Cir.), *cert. denied*, 454 U.S. 1124, 102 S.Ct. 972, 71 L.Ed.2d 111 (1981); *Detroit Police Officers' Association v. Young*, 608 F.2d 671, 696 (6th Cir.1979), *cert. denied*, 452 U.S. 938, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981).

An even more critical flaw may be found in defendants' overall statistical methodology. Again, reference must be made to the uncontroverted affidavit of plaintiffs' statistical expert, Dr. Michael Kavanagh, and again, extensive quotation is warranted:

> In terms of professionally accepted standards for the treatment of test scores, the second set of deficiencies with the defendants' methodology involves the procedures used by the defendants to normalize and standardize the raw test

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scores in order to combine the non-minorities and minorities into one final rank ordering....

Bearing in mind that the underlying assumptions made by the State for normalizing and standardizing the minority raw score distribution as discussed in paragraphs C through F are themselves defective thereby rendering the process invalid, there is a further defect inherent in the State [sic] calculations. This additional defect is at least as serious as the error in the State's underlying assumption and the combining of the two defects magnifies the error.

The first problem involving the normalization and standardization procedures used by the defendants is the violation of two basic statistical prerequisites necessary to justify standardization and normalization. These two prerequisites are: (1) the distribution of raw scores approximates the normal distribution; and (2) the number of test candidates must be sufficiently large (at least 100 per Nunnally, 1975). Although the total number

of candidates changes across the calculation worksheets provided by the defendants, it appears there are either 33 or 34 minorities and 243, 245, or 251 non-minorities. The number of minorities is simply not large enough to provide a valid statistical base for standardization and normalization. Examination of the score distributions separately for minorities and non-minorities indicates that the score distribution for non-minorities approximates the normal distribution, but in contrast, the score distribution for minorities does not approximate the normal distribution. Thus neither prerequisite has been fulfilled with the result that the approximation and estimation procedures used by the State in the normalization and standardization process are inadequate and without proper foundation, resulting in increased error attached to the adjusted minority scores. This fact destroys the validity of the *adjusted* scores for selection purposes.

To explain in layman's [sic] terms, a normal distribution of scores achieved by a sufficient number of test takers when

placed on a graph plotting the number of candidates achieving each score will result in a so-called "bell curve" which is created because most of the candidates receive marks in the middle range of scores while there are relatively few candidates who receive the highest scores or the lowest scores. Such a bell curve is what is known as a normal distribution. I emphasize at this point that plotting the results of all of the test candidates, both minority and non-minority, results in a typical bell curve. Although the State's figures seem to differ between documents, it is clear that there were over 270 total candidates. I have plotted the scores, and upon plotting the scores of the non-minority candidates, a total of approximately 240 candidates, depending on which of the State's figures one uses, the result is a typical bell curve. By contrast, when the scores of the 34 minority candidates are plotted on a graph, the line resulting is relatively flat, it is not a bell curve and prohibits standardizing scores based on the normal curve. The fact that there are only 34 minority can-

didates, not the minimum 100 needed to *allow* normalization recommended by accepted experts in the testing field (Nunnally, 1965), exacerbates an already incorrect methodology. It strains and violates every professional principle of test scoring, particularly normalization procedures, to suggest that you can adjust a non-normal curve of minority scores and then combine those scores with a normal sample of non-minority scores, and then assert that you have normalized and standardized the two score distributions. This is simply not normalizing and standardizing but rather a distortion of the terms, a violation of all current professional standards, practices and research findings.

In technical terms, the fatal defect is created when the standardization is done within distributions, i.e., within the minority distribution and separately within the non-minority distribution, and then these separate, *within distribution* adjusted final scores are combined across distributions to derive ranks for an eligibility list. The amount and direction of an adjustment to a raw score is dependent

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on the characteristics of its score distribution, i.e., the mean and variance of the raw score distribution. Since the mean and variances of the raw score distribution for minorities and non-minorities differ, the within distribution adjustments to the raw scores differ for minorities and non-minorities. Combining these two sets of adjusted scores as if they were based on the same within distribution adjustments is a violation of basic professionally accepted practices and standards of testing. The comparison between ranks of this combined distribution of adjusted final scores is simply illegitimate.

Kavanagh affidavit, ¶¶ F–J (emphasis in original).

The conclusions of Dr. Kavanagh take on particular significance when viewed in light of Title VII case law. The courts consistently have enunciated that if an employer uses an alternative selection device to minimize the adverse impact of its present selection procedure, that alternative must be at least as valid as the device which it replaces. *See Albemarle Paper Co. v. Moody,*

422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280 (1975); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801, 93 S.Ct. 1817, 1823, 36 L.Ed.2d 668 (1973); *Guardians Association of the New York City Police Department, Inc. v. Civil Service Commission*, 630 F.2d 79, 110 (2d Cir.1980), *cert. denied*, 452 U.S. 940, 101 S.Ct. 3083, 69 L.Ed.2d 954 (1981); *see also* Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.3[B] (1982) ("Where two or more selection procedures are available which serve the user's legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact"). Despite the fact that defendants' separate frequency distribution apparently has resulted in making more minority candidates eligible for promotion to Captain, defendants have come forward with no evidence controverting plaintiffs' claim that this new method is not as effective as the one it replaced. Absent such proof, this Court is unable to conclude other than that defendants illegally have discriminated against plaintiffs.

Defendants do argue strenuously for the legitimacy of separate frequency distribution as established in the course of the *Kirkland Lieutenants* litigation. Again, defendants seek too broad a reading of that case. The affidavit of John McKenna states that the separate frequency distribution was approved as a valid technique by the *Kirkland Lieutenants* court. More accurately, that court only approved a stipulation of settlement containing the following language:

> In the event that a written examination is used as part of one or both of the new selection procedures, defendants shall consider application of one or more of the following techniques to minimize or eliminate adverse impact on minority candidates should such adverse impact result:
> i. Separate frequency distributions for minority and non-minority candidates
> . . . .

Stipulation of Settlement, art. VI, ¶ 7(d). There is certainly no approval by the court of the use of such a technique in circumstances where it would not be appropriate, nor where there exists no proper foundation for its use. Indeed, the technique is merely

a suggested one and is by no means mandated by the *Kirkland* court. To the extent defendants improperly have applied the technique, this Court cannot approve its use here.[17]

17. This conclusion is further supported by the affidavit of Dr. Kavanagh:

> The Uniform Guidelines on Employee Selection Procedures ("Uniform Guidelines"), the official publication of the Equal Employment Opportunity Commission concerning testing standards, suggest that if an equally valid selection procedure is available, that alternate selection procedures [sic] may be considered under certain circumstances. It is essential, of course, that the alternate selection procedure must itself be valid. This concept of choosing between two separate but equally valid selection devices is known generally as the concept of alternative selection devices. Even under the Uniform Guidelines, before an alternate selection device should be considered, that device must be at least as valid and at least as job related as the device it replaced. (See Uniform Guidelines, 29 CRF 1607) [sic].
>
> . . . .
>
> Since Examination 37-526 is a professionally developed, job-related ability test which measured the merit and fitness of the candidates for the position of Correction Captain, the raw scores obtained by the candidates on the test are an accurate measure of the merit

(footnote continued on following page)

(footnote continued)

and fitness of the candidates to perform the job of Correction Captain. That is, the total score distribution (unadjusted), regardless of racial/ethnic background, represents important individual differences in the candidates' merit and fitness to perform the job of Correction Captain. Under such circumstances, by definition, any adjustments to the raw scores that result in differentially changing the scores dependent on the racial/ethnic background of individuals, and the rank ordering of individuals within the total score distributions introduces error into the candidates' scores. As has been discussed earlier, the normalization and standardization procedures used by the defendants did introduce differential adjustments based on racial/ethnic background, and the adjustments to the minority scores were poor approximations of true scores. Thus, by definition, and consistent with accepted testing methods and theory (Guilford, 1956; Nunnally, 1975; 1978), the score distribution adjusted by separate frequency distributions for minorities and nonminorities must be less valid and less job related than the original raw score distribution from Examination 37-526.

Based on these factors, it is my professional opinion based on my education, background, training and experience, that the substitution of the selection device utilized by

(footnote continued on following page)

D. Certain Plaintiffs' Standing to Sue

Defendants raise objections to the standing of certain plaintiffs to maintain the present suit. Specifically, defendants focus on three categories of plaintiffs. First, defendants contend that some named plaintiffs failed the examination and so, were not affected by the scoring adjustments since even without the adjustments they would not have been eligible for promotion. Second, defendants point to plaintiffs whose examination scores were so high that their promotions would be assured despite a shuffling of the rank order on the eligible list. Finally, defendants argue that one plaintiff's score, while passing, was so low that it ranked him near the bottom of the eligible list and therefore would serve to preclude his promotion.

(footnote continued)

the State, which in my view is not a valid selection device, for a valid selection device violates the Uniform Guidelines and The Principles For the Validation and Use of Personal [sic] Selection Procedures as well as the currently accepted professional standards, practices and research findings, and such a substitution under the circumstances here is not a correct selection procedure. Kavanagh affidavit, ¶¶ K-N.

[9] Standing, of course, requires that a plaintiff allege " 'such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin,* 422 U.S. 490, 498–99, 95 S.Ct. 2197, 2204–05, 45 L.Ed.2d 343 (1975) (emphasis in original) (quoting *Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962)). The plaintiff must suffer a concrete, personal injury as a result of the acts which he challenges. 422 U.S. at 508, 95 S.Ct. at 2210.

[10, 11] It is clear that the two plaintiffs (Donald E. Clark and Gerald Sweeney) who failed examination No. 37–526 lack standing to challenge defendants' actions. No rights of these plaintiffs were affected by a rescoring of the exam since their names would not have been placed on the eligible list even without the challenged scoring adjustment. Accordingly, these two plaintiffs are not proper parties to this suit and must be dismissed. As to all other plaintiffs, however, this Court cannot conclude that they have not alleged a "personal stake in the

outcome of the controversy." Notwithstanding the fact that some plaintiffs would be promoted despite a shuffling of the ranks on the eligible list, the *timing* of these plaintiffs' promotions provides the concrete interest necessary for standing. Since promotions are made in a descending order off the eligible list, N.Y.Civ.Serv.Law § 61.1 (McKinney 1983), each position on that list affords its holder a right to the first available promotion corresponding to the point on the list from which the next promotable candidate will be drawn. Since there has been some shuffling of rank caused by the rescoring, these plaintiffs necessarily will have their promotions subordinated in time to those minorities who have advanced on the list.

[12] As to those plaintiffs whose ranks relegate them to the lower end of the eligible list, it cannot be said as a matter of law that they would not suffer from the rescoring. While their low rankings make promotion appear unlikely, it is not at all certain that no promotion remains possible. Since, theoretically, all persons on the eligible list remain eligible for promotion, and because

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rank order on that list is all important, any re-ranking effect engendered by defendants' actions confers standing upon these plaintiffs.

E. Relief

[13] Plaintiffs seek, and are entitled to, declaratory and injunctive relief against the use of Examination No. 37-526's adjusted scores and the eligible list which was promulgated pursuant to them, as a basis for appointments to the position of Correction Captain. Accordingly, the scoring adjustment to Examination No. 37-526 is declared to be in violation of Title VII and defendants are enjoined from making appointments based on the adjusted results.

Monetary Relief

Plaintiffs additionally seek an award of "monetary damages for any and all financial loss which they may have sustained by reason of the delay and deprivation of promotion and damages to their reputations caused by defendants' unlawful acts." Complaint, ¶ VII(F).

[14–17] Title VII expressly provides for awards of back pay.[18] 42 U.S.C. § 2000e–5(g). Indeed, a finding of a violation of Title VII presumptively entitles a plaintiff to back pay and retroactive promotion or reinstatement. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976).[19] However, a back pay award remains within the discretion of the court and is available only where "the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice . . . ." 42 U.S.C. § 2000e–5(g); *see also Guardians Association v. Civil Service Commission*, — U.S. ——, ——, 103 S.Ct. 3221, 3235, 77 L.Ed.2d 866 (1983) ("a private

18. The eleventh amendment does *not* bar back pay awards against the states because Title VII was enacted pursuant to Congress' authority under the enforcement powers conferred by § 5 of the fourteenth amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 57, 96 S.Ct. 2666, 2671, 49 L.Ed.2d 614 (1976).

19. Of course, a Title VII defendant may rebut this presumption of entitlement by proving by clear and convincing evidence that the plaintiff would not have been hired or promoted *even if* there had been no discrimination. *Day v. Mathews*, 530 F.2d 1083, 1085 (D.C.Cir.1976).

plaintiff should recover only injunctive, non compensatory relief for a defendant's unintentional violations of Title VI"). While it is clear that defendants' actions resulted in discrimination against these plaintiffs, this Court is persuaded that defendants' intentions were only to comply with Title VII and did not manifest any deliberate attempt to discriminate against these plaintiffs. Accordingly, the request for compensatory relief in the form of back pay is hereby denied.[20]

Costs and Attorneys' Fees

[18] Title VII expressly provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United

20. That part of the request for relief which may be construed as seeking compensatory relief other than back pay, is similarly denied. *See, e.g., Hayden v. Atlanta Newspapers,* 534 F.Supp. 1166, 1168 (N.D.Ga. 1982); *Curran v. Portland Superintending School Committee,* 435 F.Supp. 1063, 1078 (D. Me. 1977); *Whitney v. Greater New York Corporation of Seventh-Day Adventists,* 401 F.Supp. 1363, 1368-70 (S.D.N.Y. 1975).

> States, a reasonable attorney's fee as part of the costs . . . .

42 U.S.C. § 2000e–5(k). Plaintiffs are hereby awarded costs, including reasonable attorneys' fees, in an amount to be determined after further documentation by the parties. Accordingly, the parties are directed to submit the affidavits necessary for a proper fee determination. *See New York State Association for Retarded Children v. Carey*, 711 F.2d 1136 (2d Cir.1983).

V

On the basis of the foregoing, it is clear that defendants have failed to come forward with sufficient evidence of disputed factual issues to preclude this Court from granting plaintiffs' motion. Defendants' actions, taken as they were without due regard for the carefully defined standards of Title VII law, are without proper legal support or justification. Since defendants do not contest, indeed, admit, the factual issues which informed their decision to act as they did, this Court's finding that, in light of plaintiff's proffer of proof that that

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determination was erroneous, compels summary judgment in plaintiffs' favor. Accordingly, plaintiffs' motion for summary judgment pursuant to Fed.R.Civ.P. 56(a) is granted. Defendants' and defendant-intervenors' motions for summary judgment are hereby denied.

It is so Ordered.

APPENDIX C.

Judgment of the United States District Court.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

JAMES BUSHEY *et al.*

v.

THE NEW YORK STATE CIVIL SERVICE COMMISSION *et al.*

82-CV-1219

Name of Judge or Magistrate Hon. Roger J. Miner

Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Plaintiffs' Motion for Summary Judgment is granted and Judgment is entered in favor of James Bushey, Roger D. Bell, Robert W. Ferber, William J. Norton, Robert J. Seitz, George Bartlett, Charles Page, Wayne Wilhelm, Wayne L. Strack, Robert Fucci, Gary H. Filion, Edward D. Rogan, Miles Barnes, Donald E. Clark and Gerald Sweeney, each individually and against Defendants The New York State

Civil Service Commission, Joseph Valenti, in his capacity as President of the New York State Civil Service Commission and Civil Service Commissioner; Josephine Gambino and James McFarland, in their capacity as Civil Service Commissioners; The New York State Department of Correctional Services; and Thomas A. Coughlin, III, in his capacity as Commissioner of the New York State Department of Correctional Services.

Date 10/4/83

J. R. SCULLY
Clerk, U.S. District Court
VIRGINIA L. LAMPHERE
Deputy

I certify that This is a true copy

Attest 10-4-83
J. R. Scully
Clerk, U.S. District Court
Virginia L. Lamphere
Deputy

U.S. District Court
N.D. of N.Y.
Filed
Oct 4 1983
At ____ O'clock ____ M.
J. R. Scully, Clerk
Albany

APPENDIX D.

Constitution, Acts, Statutes, Rules and Regulations.

CONSTITUTION

of the

UNITED STATES OF AMERICA

AMENDMENT 5

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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42 USCS § 2000e-2(a)

(a) **Employers.** It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U. S. C. §2000e—2(h).

(h) Seniority or merit system; ability tests. Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U. S. C. 206(d)).

42 USCS § 2000e-2 (j)

(j) **Preferential treatment not required on account of numerical or percentage imbalance.** Nothing contained in this title [42 USCS §§ 2000e et seq.] shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title [42 USCS §§ 2000e et seq.] to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program,

in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

CONSTITUTION
OF THE
STATE OF NEW YORK

As Amended and in Force January 1, 1982

ARTICLE V—OFFICERS AND CIVIL DEPARTMENTS

§ 6. [Civil service appointments and promotions; veterans' preference and credits]

Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive; provided, however, that any member of the armed forces of the United States who served therein in time of war, who is a citizen and resident of this state and was a resident at the time of his entrance into the armed forces of the United States and was honorably discharged or released under honorable circumstances from such service, shall be entitled to receive five points additional credit in a competitive examination for original appointment and two and one-half points additional credit in an examination for promotion or, if such member was disabled in the actual performance of duty in any war, is receiving disability payments therefor from the United States veterans administration, and his disability is certified by such administration to be in existence at the time of his application for appointment or promotion, he shall be entitled to receive ten points additional credit in a competitive examination for original appointment and five points additional credit in an examination for promotion. Such additional credit shall be added to the final earned rating of such member after he has qualified in an examination and shall be granted only at the time of establishment of an eligible list. No such member shall receive the additional credit granted by this section after he has received one appointment, either original entrance or promotion, from an eligible list on which he was allowed the additional credit granted by this section.

NEW YORK

CIVIL SERVICE LAW

§ 52. Promotion examinations

1. Filling vacancies by promotion. Except as provided in section fifty-one, vacancies in positions in the competitive class shall be filled, as far as practicable, by promotion from among persons holding competitive class positions in a lower grade in the department in which the vacancy exists, provided that such lower grade positions are in direct line of promotion, as determined by the state civil service department or municipal commission; except that where the state civil service department or a municipal commission determines that it is impracticable or against the public interest to limit eligibility for promotion to persons holding lower grade positions in direct line of promotion, such department or commission may extend eligibility for promotion to persons holding competitive class positions in lower grades which the department or commission determines to be in related or collateral lines of promotion, or in any comparable positions in any other unit or units of governmental service and may prescribe minimum training and experience qualifications for eligibility for such promotion.

2. Factors in promotion. Promotion shall be based on merit and fitness as determined by examination, due weight being given to seniority. The previous training and experience of the candidates, and performance ratings where available, may be considered and given due weight as factors in determining the relative merit and fitness of candidates for promotion.

3. Promotion eligibility of persons on preferred lists and employees on leave of absence. Any employee who has been suspended from his position through no fault of his own and whose name is on a preferred list, and any employee on leave of absence from his position, shall be allowed to compete in a promotion examination for which he would otherwise be eligible on the basis of his actual service before suspension or leave of absence.

4. Departmental and interdepartmental promotion lists. The state civil service department and municipal commissions may establish interdepartmental promotion lists which shall not be certified to a department until after the promotion eligible list for that department has been exhausted.

5. Promotion units. In the state service, or in the service of a city containing more than one county, promotion examinations may be held for such subdivisions of a department as the state civil service department or the municipal commission of such city, as the case may be, may determine to be an appropriate promotion unit, but departmental and interdepartmental promotion eligible lists shall not be certified to a department until after the promotion unit eligible lists for that department have been exhausted.

6. Promotion and transfer to administrative positions in the state service.

(a) For the purpose of this subdivision, the term "administrative positions" shall include competitive class positions in the state service in law, personnel, budgeting, methods and procedures, management, records analysis, and administrative research, as determined by the state civil service department.

(b) Except as provided in section fifty-one, vacancies in administrative positions shall be filled, so far as practicable, by promotion as prescribed in subdivision one of this section, which may be made from among persons holding administrative positions in lower grades without regard to the specialties of their lower grade positions. The civil service department, upon the request of an appointing officer stating the reasons why the filling of administrative positions in grade fourteen or higher under his jurisdiction from an interdepartmental promotion list or a promotion list including persons employed in other units of government would be in the best interests of the state service, or upon its own initiative whenever it finds that the filling of administrative positions in grade fourteen or higher in any department from such an interdepartmental or intergovernmental promotion list would be in the best interests of the state service, may certify such an interdepartmental or intergovernmental promotion list for filling such positions, without preference to departmental lists or to eligibles holding lower grade positions in the department or promotion unit in which such positions exist.

(c) Transfers shall be allowed between administrative positions in the same or related or collateral specialties which involve substantially equivalent tests or qualifications, subject to such conditions and limitations as the state civil service department may prescribe.

(d) The provisions of this subdivision shall be applicable and controlling, notwithstanding any other provisions of this section or chapter or any other law.

7. Promotion by non-competitive examination. Whenever there are no more than three persons eligible for examination for promotion to a vacant competitive class position, or whenever no more than three persons file application for examination for promotion to such position, the appointing officer may nominate one of such persons and such nominee, upon passing an examination appropriate to the duties and responsibilities of the position may be promoted, but no examination shall be required for such promotion where such nominee has already qualified in an examination appropriate to the duties and responsibilities of the position.

8. Limitation upon promotion. No promotion shall be made from one position or title to another position or title unless specifically authorized by the state civil service department or municipal commission, nor shall a person be promoted to a position or title for which there is required, by this chapter or the rules, an examination involving essential tests or qualifications different from or higher than those required for the position or title held by such person unless he has passed the examination and is eligible for appointment to such higher position or title.

9. Increase in salary as a promotion. For the purposes of this section an increase in the salary or other compensation of any person holding an office or position within the scope of the rules in force hereunder, beyond the limit fixed for the grade in which such office or position is classified, shall be deemed a promotion.

10. Credit for provisional service. No credit in a promotion examination shall be granted to any person for any time served as a provisional appointee in the position to which promotion is sought or in any similar position, provided, however, such provisional appointee by reason of such provisional appointment shall receive credit in his permanent position from which promotion is sought for such time served in such provisional appointment.

11. Notwithstanding any other provision of law, the state department of civil service may, for titles designated by it, extend to employees in the state service who are holding or who have held a position in the non-competitive class of such service the same opportunity as employees in the competitive class to take

promotion examinations if such examinations are to be held in conjunction with open competitive examinations.

12. Notwithstanding any other provisions of law, a municipal commission may, for entrance level titles as defined and designated by it, extend to employees in the service of a civil division who are holding or who have held a position in the non-competitive class of such service for a period of two years the same opportunity as employees in the competitive class to take promotion examinations for which such non-competitive class service is determined by the municipal commission to be appropriate preparation if such examinations are to be held in conjunction with open competitive examinations.

13. Notwithstanding any other provision of law, a municipal commission may, for titles designated by it, extend to employees in the service of a civil division who are holding or who have held a position in the non-competitive class of such services pursuant to the provisions of section fifty-five-b of this chapter, the same opportunity as employees in the competitive class to take promotion examinations.

14. Notwithstanding any other provision of law, the state civil service commission may, for titles designated by it, extend to employees in the state service who are holding or who have held a position in the non-competitive class of such services pursuant to the provisions of section fifty-five-b of this chapter the same opportunities to take promotion examinations as provided to employees in the competitive class.

NEW YORK

CIVIL SERVICE LAW

§ 61. Appointment and promotion

1. Appointment or promotion from eligible lists. Appointment or promotion from an eligible list to a position in the competitive class shall be made by the selection of one of the three persons certified by the appropriate civil service commission as standing highest on such eligible list who are willing to accept such appointment or promotion; provided, however, that the state or a municipal commission may provide, by rule, that where it is necessary to break ties among eligibles having the same final examination ratings in order to determine their respective standings on the eligible list, appointment or promotion may be made by the selection of any eligible whose final examination rating is equal to or higher than the final examination rating of the third highest standing eligible willing to accept such appointment or promotion. Appointments and promotions shall be made from the eligible list most nearly appropriate for the position to be filled.

2. Prohibition against out-of-title work. No person shall be appointed, promoted or employed under any title not appropriate to the duties to be performed and, except upon assignment by proper authority during the continuance of a temporary emergency situation, no person shall be assigned to perform the duties of any position unless he has been duly appointed, promoted, transferred or reinstated to such position in accordance with the provisions of this chapter and the rules prescribed thereunder. No credit shall be granted in a promotion examination for out-of-title work.

NEW YORK

CIVIL SERVICE LAW

§ 85. Additional credit allowed veterans in competitive examinations; preference in retention upon abolition of positions

1. Definitions.

(a) The terms "veteran" and "non-disabled veteran" mean a member of the armed forces of the United States who served therein in time of war, who was honorably discharged or released under honorable circumstances from such service, who was a resident of this state at the time of entrance into the armed forces of the United States and who is a citizen of the United States or an alien lawfully admitted for permanent residence in the United States at the time of application for appointment or promotion or at the time of retention, as the case may be.

(b) The term "disabled veteran" means a veteran who is certified by the United States veterans' administration as entitled to receive disability payments upon the certification of such veterans' administration for a disability incurred by him in time of war and in existence at the time of application for appointment or promotion or at the time of retention, as the case may be. Such disability shall be deemed to be in existence at the time of application for appointment or promotion or at the time of retention, as the case may be, if the certificate of such veterans' administration shall state affirmatively that such veteran has been examined by a medical officer of such veterans' administration on a date within one year of either the date of filing application for competitive examination for original appointment or promotion or the date of the establishment of the resulting eligible list or within one year of the time of retention, as the case may be; that at the time of such examination the war-incurred disability described in such certificate was found to exist; and that such disability is rated at ten per centum or more. Such disability shall also be deemed to be in existence at such time if

the certificate of such veterans' administration shall state affirmatively that a permanent stabilized condition of disability exists to an extent of ten per centum or more, notwithstanding the fact that such veteran has not been examined by a medical officer of such veterans' administration within one year of either the time of application for appointment or promotion or the date of filing application for competitive examination for original appointment or promotion, or within one year of the time of retention, as the case may be. The term "disabled veteran" shall also mean:

(1) A veteran who served in world war I, who continued to serve in the armed forces of the United States after the eleventh day of November, nineteen hundred eighteen, and who is certified, as hereinbefore provided, by the United States veterans' administration as receiving disability payments upon the certification of such veterans' administration for a disability incurred by him in such service on or before the second day of July, nineteen hundred twenty-one.

(2) A veteran who served in world war II, who continued to serve in the armed forces of the United States after the second day of September, nineteen hundred forty-five, and who is certified, as hereinbefore provided, by the United States veterans' administration as receiving disability payments upon the certification of such veterans' administration for a disability incurred by him in such service on or before the date that world war II is declared terminated.

(3) A veteran who served during hostilities participated in by the military forces of the United States subsequent to June twenty-fifth, nineteen hundred fifty, and who continued to serve in the armed forces of the United States after the twenty-seventh day of July, nineteen hundred fifty-three, and who is certified, as hereinbefore provided, by the United States veterans' administration as receiving disability payments upon the certification of such veterans' administration for a disability incurred by him in such service on or before the date that world war II is declared terminated.

(c) The term "time of war" shall include the following wars for the periods herein set forth:

(1) World war I, from the sixth day of April, nineteen hundred seventeen, to and including the eleventh day of November, nineteen hundred eighteen.

(2) World war II, from the seventh day of December, nineteen hundred forty-one, to and including the second day of September, nineteen hundred forty-five.

(3) Hostilities participated in by the military forces of the United States, from the twenty-sixth day of June, nineteen hundred fifty, to and including the thirty-first day of January, nineteen hundred fifty-five.

(4) Hostilities participated in by the military forces of the United States, from the first day of January, nineteen hundred sixty-three to the twenty-ninth day of March, nineteen hundred seventy-three.

(d) The term "time of application for original appointment or promotion" shall mean the date of the establishment of an eligible list resulting from a competitive examination for original appointment or promotion, as the case may be, which date shall be the date on which the term of such eligible list commences.

(e) The term "time of retention" shall mean the time of abolition or elimination of positions.

2. Additional credits in competitive examinations for original appointment or promotion.

(a) On all eligible lists resulting from competitive examinations, the names of eligibles shall be entered in the order of their respective final earned ratings on examination, with the name of the eligible with the highest final earned rating at the head of such list, provided, however, that for the purpose of determining final earned ratings,

(1) Disabled veterans shall be entitled to receive ten points additional in a competitive examination for original appointment and five points additional credit in a competitive examination for promotion, and

(2) Non-disabled veterans shall be entitled to receive five points additional credit in a competitive examination for original appointment and two and one-half points additional credit in a competitive examination for promotion.

(b) Such additional credit shall be added to the final earned rating of such disabled veteran or non-disabled veteran, as the case may be, after he or she has qualified in the competitive examination and shall be granted only at the time of establishment of the resulting eligible list.

3. Application for additional credit; proof of eligibility; establishment of eligible list. Any candidate, believing himself en-

titled to additional credit in a competitive examination as provided herein, may make application for such additional credit at any time between the date of his application for examination and the date of the establishment of the resulting eligible list. Such candidates shall be allowed a period of not less than two months from the date of the filing of his application for examination in which to establish by appropriate documentary proof his eligibility to receive additional credit under this section. At any time after two months have elapsed since the final date for filing applications for a competitive examination for original appointment or promotion, the eligible list resulting from such examination may be established, notwithstanding the fact that a veteran or disabled veteran who has applied for additional credit has failed to establish his eligibility to receive such additional credit. A candidate who fails to establish, by appropriate documentary proof, his eligibility to receive additional credit by the time an eligible list is established shall not thereafter be granted additional credit on such eligible list.

4. Use of additional credit. (a) Except as herein otherwise provided, no person who has received a permanent original appointment or a permanent promotion in the civil service of the state or of any city or civil division thereof from an eligible list on which he was allowed the additional credit granted by this section, either as a veteran or disabled veteran, shall thereafter be entitled to any additional credit under this section either as a veteran or a disabled veteran.

(b) Where, at the time of establishment of an eligible list, the position of a veteran or disabled veteran on such list has not been affected by the addition of credits granted under this section, the appointment or promotion of such veteran or disabled veteran, as the case may be, from such eligible list shall not be deemed to have been made from an eligible list on which he was allowed the additional credit granted by this section.

(c) If, at the time of appointment from an eligible list, a veteran or disabled veteran is in the same relative standing among the eligibles who are willing to accept appointment as if he had not been granted the additional credits provided by this section, his appointment from among such eligibles shall not be deemed to have been made from an eligible list on which he was allowed such additional credits.

(d) Where a veteran or disabled veteran has been originally appointed or promoted from an eligible list on which he was allowed additional credit, but such appointment or promotion is

thereafter terminated either at the end of the probationary term or by resignation at or before the end of the probationary term, he shall not be deemed to have been appointed or promoted, as the case may be, from an eligible list on which he was allowed additional credit, and such appointment or promotion shall not affect his eligibility for additional credit in other examinations.

5. Withdrawal of application; election to relinquish additional credit. An application for additional credit in a competitive examination under this section may be withdrawn by the applican: at any time prior to the establishment of the resulting eligible list. At any time during the term of existence of an eligible list resulting from a competitive examination in which a veteran or disabled veteran has received the additional credit granted by this section, such veteran or disabled veteran may elect, prior to permanent original appointment or permanent promotion, to relinquish the additional credit theretofore granted to him and accept the lower position on such eligible list to which he would otherwise have been entitled; provided, however, that such election shall thereafter be irrevocable. Such election shall be in writing and signed by the veteran or disabled veteran, and transmitted to the state civil service department or the appropriate municipal civil service commission.

6. Roster. The state civil service department and each municipal commission shall establish and maintain in its office a roster of all veterans and disabled veterans appointed or promoted as a result of additional credits granted by this section to positions under its jurisdiction. The appointment or promotion of a veteran or disabled veteran as a result of additional credits shall be void if such veteran or disabled veteran, prior to such appointment or promotion, had been appointed or promoted as a result of additional credits granted by this section.

7. Preference in retention upon the abolition of positions. In the event of the abolition or elimination of any position in the civil service for which eligible lists are established or any position the incumbent of which is encompassed by section eighty-a of this chapter, any suspension, demotion or displacement shall be made in the inverse order of the date of original appointment in the service subject to the following conditions: (1) blind employees shall be granted absolute preference in retention; (2) the date of such original appointment for disabled veterans shall be deemed to be sixty months earlier than the actual date, determined in accordance with section thirty of the general construction law; (3) the date of such original appointment for non-dis-

abled veterans shall be deemed to be thirty months earlier than the actual date, determined in accordance with section thirty of the general construction law; (4) no permanent competitive class employee subject to the jurisdiction of the civil service commission of the city of New York who receives an injury in the line of duty, as defined in this paragraph, which requires immediate hospitalization, and which is not compensable through workmen's compensation may be suspended, demoted or displaced pursuant to section eighty of this chapter within three months of the date of his confinement, provided that medical authorities approved by such commission shall certify that the employee is not able to perform the duties of his position; provided further, that such three-month period may be extended by such commission for additional periods not to exceed one year each upon the certification of medical authorities selected by such commission that the employee is, as a result of his injury, still not able to perform the duties of his position. An injury in the line of duty, as used herein, shall be construed to mean an injury which is incurred as a direct result of the lawful performance of the duties of the position. In determining whether an injury was received in the line of duty, such commission shall require the head of the agency by which the employee is employed to certify that the injury was received as a direct result of the lawful performance of the employee's duties; and (5) the spouse of a veteran with one hundred percent service connected disability shall be deemed to be sixty months earlier than the actual date, determined in accordance with section thirty of the general construction law, provided, the spouse is domiciled with the veteran-spouse and is the head of the household. This section shall not be construed as conferring any additional benefit upon such employee other than a preference in retention. Such employee shall be subject to transfer upon the abolition of his function within his agency or department.

7-a. For the purpose of subdivision seven of this section, the terms "date of original appointment" and "date of original appointment in the service" shall mean, for persons subject to subdivision one-a of section eighty of this chapter, the date of original appointment on a permanent basis in the grade or title in the service of the governmental jurisdiction in which such abolition or reduction occurs.

8. Penalty for denial of preference in retention. A refusal to allow the preference in retention provided for in this section to any veteran or disabled veteran, or a reduction of his compensation intended to bring about his resignation shall be deemed a misdemeanor, and any such veteran or disabled veteran shall have a right of action therefor in any court of competent jurisdiction for damages and for righting the wrong.

RULES AND REGULATIONS

OF THE

DEPARTMENT OF CIVIL SERVICE

As amended to January 12, 1983

§ 3.6 Establishment of eligible lists

Every candidate who attains a passing mark in an examination as a whole and who meets the standards prescribed, if any, for separate subjects or parts of subjects of the examination shall be eligible for appointment to the position for which he was examined and his name shall be entered on the eligible list in the order of his final rating; but if two or more eligibles receive the same final rating in the examination, they shall be ranked in accordance with such uniform, impartial procedure as may be prescribed therefor by the Civil Service Department.

RULES AND REGULATIONS
OF THE
DEPARTMENT OF CIVIL SERVICE

As amended to January 12, 1983

§ 4.2 Appointment and promotion

(a) Except as otherwise provided herein, appointment or promotion to a position in the competitive class shall be made by the selection of a person on the appropriate eligible list willing to accept such appointment and whose final rating in the examination is equal to or higher than the rating of the third highest ranking eligible on the list indicating willingness to accept such appointment. The term "ranking" as used herein refers to the order in which the names of eligibles appear on the eligible list as provided in section 3.5.

(b) Whenever a vacancy exists in a competitive class position and an open competitive examination does not result in an eligible list containing the names of at least three persons willing to accept appointment, the Civil Service Department may permit the appointing authority to nominate a person for noncompetitive examination for such position and, if such nominee shall be certified by the Civil Service Department as qualified, he may be appointed to fill such vacancy; or the Civil Service Department may designate the eligible list, if there be one, as a continuing eligible list in accordance with section 57 of the Civil Service Law, and insert therein the names of additional eligibles as they are found qualified by examinations held at such intervals as may be prescribed.

(c) Promotion by noncompetitive examination may also be made as provided by law.

(d) Certification of a promotion eligible list shall not be required for filling certain vacancies. A promotion eligible list shall not be certified for filling a permanent vacancy created by upward reclassification of a permanently encumbered position where promotion from such list would require the layoff of a permanent employee or the reassignment of a permanent employee to a different geographical location; but this provision shall not apply if the incumbent whose position was reclassified has, following such reclassification, twice failed to qualify for promotion to the reclassified position.

(e) An open competitive eligible list shall not be certified for filling a permanent vacancy created by upward reclassification of a permanently encumbered position if appointment from such list would require the layoff of a permanent employee or the reassignment of a permanent employee to a different agency or a different geographical location; but this provision shall not apply if the incumbent whose position was reclassified has, following such reclassification, twice failed to qualify for appointment to the reclassified position.

RULES AND REGULATIONS
OF THE
DEPARTMENT OF CIVIL SERVICE

As amended to January 12, 1983

§ 66.2 Standards for passing examinations

No candidate shall be passed in an examination or have his name entered upon an eligible list who fails to attain a passing mark in the examination as a whole, or who fails to meet minimum standards prescribed for any subject or parts of subjects of the examination; provided, however, that a candidate whose performance rating is unsatisfactory may be passed in a promotion examination if he meets minimum standards and receives a passing mark in all other subjects and parts of subjects of the examination.

RULES AND REGULATIONS
OF THE
DEPARTMENT OF CIVIL SERVICE

As amended to January 12, 1983

§ 67.1 Scoring of examinations

(a) The final score of each candidate in a written or oral or other test or combination of tests comprising an examination shall be reported on a scale to 100, where the score of 100 shall represent the best performance possible, expected or attained, and where the score of 70 shall represent a performance meeting the minimum needs of the position to be filled with regard to number and quality of eligibles, and where the score of 60– shall represent any score below 60.

(b) In examinations or tests in which, considering the needs of the service or the difficulty of the examination or test or other substantial factors, a sufficient number of candidates of sufficient quality achieve raw scores or weighted or corrected raw scores, as defined under this section, or some combination of such scores equivalent to 70% or higher of the maximum possible score, final scores shall be determined from raw scores or weighted or corrected raw scores or some combination of such scores, on a percent basis or by an arithmetic adjustment or a se-

ries of arithmetic adjustments or by a statistical adjustment, as defined under this section, or by any combination of such adjustments such that final scores at or about 70 will approximate percent scores; provided that no candidate is failed who would pass under percent scoring, that the relative order of scores is maintained, and that the scoring adjustment used is approved by the director or assistant director of examinations and staffing services.

(c) In examinations or tests in which, considering the needs of the service or the difficulty of the examination or test or other substantial factors, an insufficient number of candidates achieve raw scores or weighted or corrected raw scores, as defined under this section, or some combination of such scores equivalent to 70 percent or higher of the maximum possible score, final scores may be determined from raw scores or weighted or corrected raw scores, or some combination of such scores, by an arithmetic adjustment or a series of arithmetic adjustments or by a statistical adjustment, as defined under this section, or by any combination of such adjustments such that more candidates are passed than would pass if final scores at or about 70 approximated percent scores; provided that the relative order of scores is maintained, that the necessary quality of eligibles is not jeopardized, and that the scoring adjustment used is approved by the administrative director, deputy administrative director, assistant administrative director or director of examinations and staffing services.

(d) **Raw score.** A raw score is the number of questions answered correctly in a short answer written test or the combination of examiners' ratings in an oral or performance test or the number of credit points earned or assigned in any other kind of test, or some combination of the foregoing.

(e) **Part raw score.** A part raw score is the raw score from a part of a test or the raw score from a test that is part of an examination.

(f) **Corrected raw score.** A corrected raw score is a score that has been derived from a raw score from a short answer written test by one of the following methods:

(1) Deductions for wrong answers, as distinguished from omissions, may be made from raw scores. For example, one point may be deducted from raw scores for every four wrong answers. In this case, for a 100-item test, a candidate who answered 60 questions correctly and 20 questions

incorrectly and who omitted answering 20 questions would have a raw score of 60 and a corrected raw score of 55.

(2) Additions for omissions may be made to raw scores. For example, one point may be added to raw scores for every five omissions. In this case, for a 100-item test, a candidate who answered 60 questions correctly and 20 questions incorrectly and who omitted answering 20 questions would have a raw score of 60 and a corrected raw score of 64.

These methods may also be applied to part raw scores, the results of which would then be combined with raw scores or weighted or corrected raw scores from the other parts of the test or other tests in the examination.

(g) Weighted raw score.

A weighted raw score is a score that has been derived from a raw score by assigning a weight other than one to one or more of the part raw scores that contribute to the raw score. For example, in a short answer written test, a weight of two may be assigned to each correct answer to a group of questions comprising the most important part of the test and all other correct answers may be assigned a weight of one each. In this case, a candidate correctly answering seven questions with a weight of two each and correctly answering 69 questions with a weight of one each would get a weighted raw score of 83. Such weights may be assigned, on the basis of job analysis or on considerations of reliability and/or validity of tests or parts of tests, uniformly for the total candidate group, or differently for candidate subgroups, if scores of such subgroups are shown to differ substantially in their relation to measures of performance.

(h) Arithmetic adjustments.

(1) An arithmetic adjustment is the adding to or subtracting from raw scores or weighted or corrected raw scores or some combination thereof or some fraction or multiple of such scores a uniform whole number or fraction or combination thereof. For example, final scores may be determined by using an equation such as:

$$\text{Final Score} = 3R/2 + 2\frac{1}{2}$$

where R is the raw score or the weighted or corrected raw score or some combination of such scores. In this case, a raw score of

60 would become a final score of 92.5. In another case, final scores may be determined by using an equation such as:

$$\text{Final Score} = R/2 - 10$$

In this case a raw score of 180 would become a final score of 80.

(2) A series of arithmetic adjustments consists of the division of the distribution of raw scores or weighted or corrected raw scores or some combination of such scores into two or more mutually exclusive ranges of scores and applying a separate arithmetic adjustment as defined above in each range. For example, a distribution of raw scores from a 120-item test may be split so that all raw scores in the range 85 to 120 are converted to final scores by an equation such as:

$$\text{Final Score} = R/2 + 40$$

and raw scores in the range 1 – 84 are converted to final scores by an equation such as:

$$\text{Final Score} = R - 2$$

In this case a raw score of 78 would become a final score of 76 and a raw score of 100 would become a final score of 90. This would accomplish a lowering of the passing point below percent standards and at the same time would provide for more than 31 scores between 70 to 100.

(i) Statistical adjustment.

A statistical adjustment is the assignment of final scores according to a predetermined form based on a statistical division of the distribution of raw scores or weighted or corrected raw scores or some combination of such scores. Examples:

(1) The raw scores or weighted or corrected raw scores or some combination of such scores of all passing candidates may be evenly distributed between 70 and 100 with the best 1/6 of eligibles assigned final scores from 95 to 100, the next 1/6 assigned final scores from 90 to 95, the next 1/6 assigned final scores from 85 to 90, the next 1/6 assigned final scores from 80 to 85, the next 1/6 assigned final scores from 75 to 80, and the lowest 1/6 assigned final scores from 70 to 75.

(2) A final passing score of 70 may be assigned to candidates attaining a mean raw score or mean weighted or corrected raw score or a mean of some combination of such scores, and a final score of 80 may be assigned to candidates attaining one standard deviation higher, etc.

(j) Any officer or employee to whom the identity and rating of one or more candidates in an examination is known shall be disqualified from recommending or approving the use of any scoring adjustment in such examination. In the event that the identity and rating of one or more candidates in an examination is known to an officer or employee whose duties and functions would otherwise involve the recommendation or approval of the use of a scoring adjustment in such examination, the duties and functions of such officer or employee with respect to the recommendations or approval of a scoring adjustment in such examination shall be assigned to another appropriate officer or employee who is not disqualified under the provision of this section.

(k) Where one of the above methods of scoring is used, the nature of the scoring adjustment shall be made known upon request to any candidate who inspects his examination paper or questions his rating.

RULES AND REGULATIONS
OF THE
DEPARTMENT OF CIVIL SERVICE

As amended to January 12, 1983

§ 67.2 Credit for seniority

In promotion examinations, credit for seniority shall be granted by the addition of points, on the basis of scales approved by the administrative director, to the average score earned by each successful competitor in the other parts of the examination.

No. 84-336

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JAMES BUSHEY, *et al.*,

Petitioners,

v.

NEW YORK STATE CIVIL SERVICE COMMISSION, *et al.*,

Respondents,

GERALD A. WELLS, *et al.*,

Respondents-Intervenors.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS-INTERVENORS' BRIEF IN OPPOSITION

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RESPONDENTS-INTERVENORS' BRIEF IN OPPOSITION

Gerald A. Wells, Wilbur I. Wright, Jospeh P. Bates, Thomas D. Haskell and Percy Jones, respondents-intervenors on

this petition (hereinafter referred to as "intervenors"), respectfully submit this brief in opposition to the petition for a writ of certiorari. Intervenors submit that the petition should be denied because:

1. The decision of the Second Circuit is in accord with established law under Title VII of the Civil Rights Act of 1964, including the fundamental principle that voluntary compliance is the preferred means of achieving Title VII's goals; and

2. The cause has been remanded to the United States District Court for the Northern District of New York for discovery and trial, and review by this Court at this time in the absence of a complete factual record would be premature.

QUESTIONS PRESENTED

1. Whether the Second Circuit correctly decided, in light of the strong preference for voluntary compliance under Title VII of the Civil Rights Act of 1964 as amended, that the New York State Civil Service Commission could voluntarily adjust the scores of all candidates who had taken a written civil service promotional examination in order to eliminate the adverse racial impact of the examination, without waiting to be sued by minority candidates.

2. Whether, in light of the fact that the cause has been remanded to the district court for discovery and trial of issues directly related to those raised in the petition, and the fact that the

petition seeks review on legal grounds which were not considered in the decisions below, this Court should refrain from exercising its right to hear the case.

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ACTS, STATUTES, RULES AND REGULATIONS INVOLVED

Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e, et seq.; 29 C.F.R. § 1607.4(D); New York Civil Service Law § 52(8); 4 NYCRR 67.1.[1] 29 C.F.R. § 1607.4 is set out in the Appendix; the other provisions have been previously provided in Appendix D to the Petition.

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[1] Although the complaint in this action purported to state causes of action under the Fifth and Fourteenth Amendments to the United States Constitution, both the district court and the Court of Appeals have considered the issues raised herein solely under Title VII of the Civil Rights Act. Therefore, if this Court determines to grant the writ, review of the cause should be limited to issues arising under that statute. Accordingly, intervenors disagree with petitioners that any constitutional provisions are presently at issue.

STATEMENT OF THE CASE

A. The Nature of the Case

The present "reverse discrimination" action was commenced on November 2, 1982 by several white officers of the New York State Department of Correctional Services ("Corrections"). The gravamen of plaintiffs' complaint was that a scoring procedure adopted by the New York State Civil Service Commission ("Civil Service") to rank candidates who had taken an examination for the position of Corrections Captain ("Examination No. 37-526") caused minority candidates to receive a "racial bonus" violative of Title VII of the Civil Rights Act of

1964, 42 U.S.C. § 2000e, et seq.,[2] and of the Fifth and Fourteenth Amendments to the United States Constitution.

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[2] Title VII provides:

> (a) It shall be an unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

The scoring procedure at issue, known as "separate frequency distribution" or "normalization," was adopted by the State to compensate for the disparate racial impact of the examination, which Civil Service determined to exist after an analysis of candidates' raw scores showed that white candidates passed Examination No. 37-526 at twice the rate of minority candidates. As a result of the normalization procedure, eight additional minority candidates were included in an eligible list of almost 130 names. No white candidates were excluded from the list.

By order dated February 16, 1983, the district court permitted Gerald A. Wells, Wilbur I. Wright, Joseph P. Bates, Thomas D. Haskell and Percy Jones to

intervene as defendants in this action pursuant to Rule 24(b)(2) of the Fed. R. Civ. P. Each is a minority candidate whose name appears on Eligible List 37-526.

Following limited discovery, all parties filed motions for summary judgment in the district court in June, 1983. On October 4, 1983, the district court decided that the State's scoring method discriminated against white officers under Title VII, and ordered the State to stop using Eligible List 37-526 to make either provisional or permanent appointments to the Captain position. Both the State and the intervenors appealed.

The Second Circuit, in reversing the lower court's grant of summary judgment, determined that the district judge had misunderstood and misapplied

the applicable legal principles under Title VII. Specifically, the Court of Appeals ruled that the district judge erred in finding: 1) that the factors relied upon by the State were insufficient to establish a prima facie case of racial impact; 2) that the State was required to attempt rebuttal of the prima facie case before it could take voluntary action to cure the adverse impact; and 3) that the methodology adopted by the State to adjust candidates' scores was fundamentally flawed.

The Second Circuit recognized that the position advocated by the white officers and adopted by the district court would impede an employer from taking voluntary action to cure the obvious adverse impact of a selection device, and

would instead require the employer in each instance to engage in protracted and unnecessary litigation to eliminate discrimination.

The case has now been remanded to the district court for further discovery and trial.

B. Factual Background

On January 30, 1982, Civil Service administered a test for promotion of candidates to the position of Corrections Captain.[3] At the time Examination No.

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[3] In extensive previous litigation, the propriety of examinations administered by Civil Service for the titles of Corrections Sergeant and Corrections Lieutenant had already been considered. See Kirkland v. New York State Department of Correctional Services, 374 F. Supp. 1361 (S.D.N.Y. 1974), aff'd in part and rev'd in part, 520 F.2d 420

[Footnote continues]

37-526 was given, no minority officers held permanent appointments to the position of Corrections Captain.

After the examination was administered, Civil Service tabulated each candidate's correct and incorrect answers to produce a set of raw scores. Upon review of these raw scores, it became clear that white candidates had

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[Footnote continued]

(2d Cir.), reh. en banc denied, 531 F.2d 5 (2d Cir. 1975), cert. denied, 429 U.S. 823 (1976), reh. denied, 429 U.S. 1124 (1977), on remand, 482 F. Supp. 1179 (S.D.N.Y.), aff'd, 628 F.2d 796 (2d Cir. 1980), cert. denied, 450 U.S. 980 (1981)("Kirkland Sergeants"), and Kirkland v. New York State Department of Correctional Services, 552 F. Supp. 667 (S.D.N.Y. 1982), aff'd, 711 F.2d 1117 (2d Cir. 1983), cert. denied, ____ U.S. ____, 104 S. Ct. 997 (1984) ("Kirkland Lieutenants").

passed the examination at approximately twice the rate of minority candidates.[4] A tabulation of raw scores produced the following results:

	Test Takers	Test Passers	Passing Rate
White	243	119	49%
Minority	32	8	25%

The State reviewed these results in light of the "four-fifths" rule of the E.E.O.C. Uniform Guidelines on Employee Selection,[5]

---

[4] Pursuant to New York State law, a candidate must achieve a score of 70% or better to pass a civil service examination. N.Y. Civ. Serv. Law § 52(8), 4 NYCRR 67.1(a). For Examination No. 37-526, which had 103 questions, the passing score was therefore 72.

[5] E.E.O.C. Uniform Guidelines on Employee Selection, 29 C.F.R. § 1607.4(D), as set forth in full in the appendix to this brief. These guidelines provide that a selection rate for minorities which is less than 80% of the selection rate for the highest scoring group is regarded as evidence of adverse racial impact.

and determined that the examination had an adverse impact on minority candidates, in that the passing rate for minority candidates was substantially less than four-fifths the rate of white candidates. To correct this statistical showing of adverse impact, the State voluntarily adjusted the scores of all candidates by converting them to separate frequency distributions (known commonly as "bell curves"), and then equating or normalizing the distributions. The same method of score adjustment was applied to the scores of white and minority candidates.

Civil Service had no means to conduct a comparative study of job performance of white and minority Corrections Captains before adjusting the scores -- at the time Examination No. 37-526 was administered,

there were no permanent minority Captains whose performance could be evaluated. However, Civil Service did have good reason to believe that the disparity in scores was not the result of actual differences in job performance between whites and minorities. A random sample of job performance of candidates for the most recent Corrections Lieutenant examination showed no statistically significant differences in job performance between minorities and nonminorities, and a study of job performance conducted as a result of earlier litigation concerning the Corrections Sergeant title also showed no significant differences.[6]

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6 See Bushey v. New York State Civil Service Commission, 733 F.2d 220, 222 n.3 (2d Cir. 1984).

After completing the normalization of candidates' scores, Civil Service propounded a numerical list of passing candidates who were eligible for promotion to the position of Captain. This list took into account not only candidates' test scores, but applicable seniority and veterans' credits (as required by State law). Shortly after the list was promulgated, plaintiffs commenced the present lawsuit claiming that the scoring procedure adopted by the State discriminated against white candidates.

REASONS FOR DENYING THE WRIT

I. The Decision of the Second Circuit is in Accord with Established Law Under Title VII, Including the Fundamental Principle that Voluntary Compliance is the Preferred Means of Achieving Title VII's Goals.

Although petitioners strain to show otherwise, the simple fact is that the

decision of the Second Circuit in this case adheres to the principles enunciated by this Court in earlier Title VII cases.

A. The Basis of the Circuit Court's Decision

The first question considered by the Circuit Court was whether the State had properly determined that the lopsided raw score results of Examination No. 37-526 established a prima facie case of adverse impact. Bushey v. New York State Civil Service Commission, 733 F.2d 220, 224-226 (2d Cir. 1984). Applying the teachings of Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975), McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), and Griggs v. Duke Power Co., 401 U.S. 424, 431-36 (1971), the Second Circuit correctly concluded that a statistical showing of adverse racial impact is sufficient to

make out a prima facie case under Title VII. See also Dothard v. Rawlinson, 433 U.S. 321, 329 (1977), and New York City Transit Authority v. Beazer, 440 U.S. 568, 584 (1979).

Once the State determined that the raw-score passing rate for minority candidates was only half that of whites, it relied upon the E.E.O.C. "four-fifths" rule to decide that the test had discriminatory impact and that score adjustment would therefore be proper. The important role of the E.E.O.C. guidelines in making determinations of this kind has been recognized by this Court, which has declared that the guidelines are entitled to "great deference." Albemarle Paper Co. v. Moody, supra, 422 U.S. 405, 431 (1975); see also

Griggs v. Duke Power Co., supra, 401 U.S. 424, 433-34 (1971).

The Circuit Court then proceeded to consider whether there could be found in the language of Title VII or in the jurisprudence related thereto, any suggestion that an employer must attempt to rebut the prima facie case of adverse impact before voluntarily adopting curative measures. It concluded that the imposition of such a burden "is contrary to the case law and the statute's underlying policy." 733 F.2d at 226. The correctness of this finding is supported by numerous Supreme Court decisions holding that voluntary compliance is the preferred means to achieve Title VII's goal of eliminating employment discrimination. See Carson v. American Brands, Inc., 450

U.S. 79, 88 n.14 (1981); United Steelworkers v. Weber, 443 U.S. 193, 201-02 (1979); Regents of the University of California v. Bakke, 438 U.S. 265, 364 (1978) (Op. of Brennan, White, Marshall and Blackmun); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974).

As the Court of Appeals noted, the rebuttal burden urged by petitioners directly contravenes the approach adopted by this Court in United Steelworkers v. Weber, 443 U.S. 193 (1979).

> Without requiring a judicial determination of racial discrimination (in fact, the defendant therein denied that it had engaged in past discrimination), the majority in Weber upheld, as permissible under Title VII, an affirmative action plan "designed to eliminate conspicuous racial imbalance in traditionally segregated job categories." Id. at 209, 99 S. Ct. at 2730 (footnote omitted). In doing so, the Court rejected the

> contention raised by nonminority plaintiffs that a judicial determination of racial discrimination was a necessary predicate to the adoption of race-conscious remedial measures. The broadness of the majority's view is suggested by Justice Blackmun's concurrence, which in urging a narrower ground nevertheless noted that "[t]he Court . . . declines to consider the narrow 'arguable violation' approach and adheres instead to an interpretation of Title VII that permits affirmative action by an employer whenever the job category in question is 'traditionally segregated.'" Id. at 212, 99 S. Ct. at 2731.

733 F.2d at 227-28 (footnote omitted).

Petitioners attempt to distinguish Weber by suggesting that the presence of a collective bargaining agreement in that case was in some way essential to the outcome (Petition at 14). Yet there is nothing in the language of Weber to suggest that the Court's decision hinged on the agreement, and petitioners have

not cited a single word in support of their view. The uncomplicated holding of Weber -- that Congress did not intend to prevent employers from taking voluntary measures under Title VII to eliminate discrimination in traditionally segregated job categories -- is particularly applicable in this instance, since, at the time Examination No. 37-526 was administered, not a single minority officer held a permanent position as Corrections Captain.

In a case recently decided by this Court and relied upon by petitioners, Justice O'Connor, writing for the majority, noted:

> [T]he legal rules fashioned to implement Title VII should be designed, consistent with other Title VII policies, to encourage Title VII defendants promptly to

> make curative, unconditional job offers to Title VII claimants, thereby bringing defendants into "voluntary compliance" and ending discrimination far more quickly than could litigation proceeding at its often ponderous pace. Delays in litigation unfortunately are now commonplace, forcing the victims of discrimination to suffer years of underemployment or unemployment before they can obtain a court order awarding them the jobs unlawfully denied them.

Ford Motor Co. v. E.E.O.C., 458 U.S. 219, 228 (1982). The rule urged by petitioners would make voluntary compliance in the face of obvious adverse impact virtually impossible, and would leave both the employer and the victim of discrimination no choice but to enter into litigation to cure discriminatory practices. The decisions of this Court fully support the Second Circuit's rejection of this inefficient, backward-thinking principle.

B. Petitioners' Alleged Points in Error

Steering clear of the settled Supreme Court doctrine underpinning the Second Circuit's decision in this case, petitioners attempt to solicit this Court's review by relying on a number of subordinate and tangential issues. Neither singly nor in the aggregate are these matters capable of creating a reviewable issue, where none in fact exists. Nevertheless, intervenors will respond to each in turn.

Petitioners rely heavily on this Court's recent decision in Firefighters v. Stotts, ____ U.S. ____, 104 S. Ct. 2576 (1984), claiming that a single statement in that decision nullifies years of thoughtful jurisprudence supporting

voluntary compliance to end racial discrimination (Petition at 12, 13-14, 20). That statement, in its entirety, reads:

> The settlement theory, whatever its merits might otherwise be, has no application when there is no "settlement" with respect to the disputed issue.

____ U.S. ____, 104 S. Ct. at 2588. This slender reed, however, will not support petitioners' argument. In the first place, Stotts is plainly distinguishable from the present case since it involved adjustments to an established seniority system, and not a discriminatory selection device. As this Court has often noted, seniority systems occupy a special place under Title VII, resulting from a clearly expressed Congressional intent to protect the vested seniority rights of employees. Id. at ___, 104 S. Ct. at 2587; Pullman-

Standard v. Swint, 456 U.S. 273, 276 (1982); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 349-50 (1977). Moreover, a careful reading of the entire paragraph containing the statement upon which petitioners rely reveals that this Court did not intend to discredit the "settlement theory." Rather, the Court expressed its opinion that the Court of Appeals had acted improperly in upholding injunctive relief which contravened the seniority terms of an existing consent decree. Absolutely nothing in the cited paragraph, or in the remaining text of the opinion, indicates that this Court had determined to renounce its established rulings

supporting voluntary compliance with Title VII.[7]

Equally central to petitioners' argument is their oft-repeated assertion that Examination No. 37-526 was a "professionally developed, job-related ability test," and that this "fact" or "admission" precluded the Court of Appeals from finding that the disparate score results constituted adverse racial impact on minority candidates (Petition at 4, 8, 11, 12, 14, 16).[8]

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7 As Justice Stevens noted in a concurring opinion, "[t]he Court's discussion of Title VII is wholly advisory. This case involves no issue under Title VII; it only involves the administration of a consent decree." Id. at ___, 104 S. Ct. at 2594.

8 The intervenors did not make the admission of job-validity petitioners allege, but rather admitted that the entire scoring procedure, including normalization of all candidates' scores, was valid under the circumstances.

Yet, the record in this case contains not a single fact upon which the petitioners' conclusion of job-validity can be based. No study of job-relatedness has been performed with regard to Examination No. 37-526, and it is unlikely that any such study could successfully be undertaken. The reason is simple. Since there are no permanent minority Captains, comparative statistical analysis of white and minority officers would be difficult or impossible.

In the earlier Kirkland Lieutenants litigation,[9] the white officers had urged that validation studies were a necessary precondition to voluntary action to cure adverse impact. The Court of

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[9] See note 3, supra.

Appeals flatly rejected that proposition:

> [The white officers'] argument, however, would turn Title VII law on its head since, as [they] themselves concede, job-relatedness is never presumed and only becomes an issue after it is affirmatively raised by the defendant. . . . Moreover, if [their] position were adopted, no Title VII testing case could be settled by agreement until a judicial determination on the test's job-validity was made. Such a result would seriously undermine Title VII's preference for voluntary compliance and is not warranted.

711 F.2d at 1129-30, cert. denied, 104 S. Ct. 997 (1984) (citations omitted). In the present case, petitioners attempt to avoid the issue by asking their adversaries and the courts simply to assume the validity of the test. Of course, such an assumption is impossible. Absent the assumption, however, petitioners' entire argument collapses, and the correctness of the Second Circuit's

finding regarding adverse impact becomes unassailable.

Petitioners' next point is that the Second Circuit improperly equated a prima facie case of adverse impact with a factual finding of discrimination in alleged ignorance of this Court's holding in Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), and thereby improperly permitted the State to adopt voluntary actions which harmed white candidates in the absence of a suitable "finding" of discrimination (Petition at 15-16). This argument misconstrues the holding of Furnco. The issue in that case was not the manner in which prima facie evidence of adverse impact should be treated, for that question had long before been settled in McDonnell Douglas Corp. v. Green, 411

U.S. 792 (1973), and its progeny. Rather, Furnco stood for the proposition that, in the context of a Title VII lawsuit, an employer should be permitted to attempt rebuttal of the prima facie case if it chooses to do so, using statistical methods if appropriate. 438 U.S. at 479-80. There is nothing in Furnco which requires an employer to attempt rebuttal in litigation; voluntary compromise is one obviously available alternative. Moreover, there certainly is nothing in Furnco which prohibits an employer from taking appropriate voluntary action to cure adverse impact before a lawsuit is commenced by the affected candidates. Voluntary compliance, in fact, is preferred. See supra, pp. 14-16.

Neither of the cases which petitioners cite for the point that certain "findings" are necessary to support remedial action were decided under Title VII of the Civil Rights Act. See Regents of the University of California v. Bakke, 438 U.S. 265 (1978)(decided under Title VI); Fullilove v. Klutznick, 448 U.S. 448 (1980)(decided under the Equal Protection clause of the Fifth and Fourteenth Amendments). Interestingly, petitioners have not called to this Court's attention an en banc decision of the Eighth Circuit in which this issue was considered under Title VII and 42 U.S.C. § 1981. Setser v. Novack Investment Co., 657 F.2d 962 (8th Cir. 1981). In Setser the Court of Appeals stated "[t]he employer's internal investigation and analysis of

its work force which results in a conclusion of a racially imbalanced work force would satisfy the employer's burden" in a reverse discrimination lawsuit to show that its actions were remedial in nature. Id. at 968. In the instant case, the State's actions can only be seen as reasonable in light of the prolonged maintenance of the Captain position as an all-white enclave.

Petitioners' final claims are that the State's actions in this case constituted unlawful discrimination against them, established an impermissible racial classification, and resulted in a burden on whites which exceeded the harm to be cured (Petition at 15-19). These arguments are all constitutional in nature, and nearly all of the cases relied upon

by petitioners in this section of their petition were decided on constitutional, rather than Title VII, grounds.[10]

Although petitioners raised certain constitutional claims in their complaint, both the district court and circuit opinions in this case were decided solely under Title VII law. It is axiomatic that this Court will decline to reach constitutional issues when a case may properly be considered on narrower statutory grounds. See, e.g., Harris v.

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[10] E.g., Fullilove v. Klutznick, supra, 448 U.S. 448 (1980); General Building Contractors Association v. Pennsylvania, 458 U.S. 375 (1982); Hills v. Gautreaux, 425 U.S. 284 (1976); Milliken v. Bradley, 418 U.S. 717 (1974); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979); Loving v. Virginia, 388 U.S. 1 (1967).

McRae, 448 U.S. 297, 306-307 (1980); Wolston v. Reader's Digest Association, Inc., 443 U.S. 157, 160 n.2 (1979), and cases cited therein. Moreover, this Court has specifically called attention to the importance of this distinction in a case involving employment testing procedures, noting that "[w]e have never held that the constitutional standard for adjudicating claims of invidious discrimination is identical to the standards applicable under Title VII. . . ." Washington v. Davis, 426 U.S. 229, 238-39 (1976). See also, United Steelworkers v. Weber, 443 U.S. 193, 206 n.6 (1979). For this reason, intervenors believe that petitioners are precluded from relying on constitutional doctrine, applying standards wholly different from those

arising under Title VII, in seeking review before this Court.

Even if constitutional standards are entitled to consideration, however, petitioners' arguments must fail. The fact that the remedy adopted by the State to cure a statistical showing of adverse impact might have had a slight negative effect on some white candidates simply does not indicate that the constitutional rights of those individuals were violated. In this case, the remedy adopted by Civil Service was carefully tailored to the harm resulting from the adverse impact of the examination. Normalization did not create a "quota" as petitioners assert (Petition at 17), but rather allowed minority candidates to pass the examination at a rate equal to the

relative job performance of minority officers, as determined in studies conducted in connection with earlier litigation concerning the Corrections Sergeant and Lieutenant titles. See supra, p. 10. Significantly, normalization did not require the removal of a single white candidate from the eligible list. Under these circumstances, it seems clear that the constitutional standards set out in Milliken v. Bradley, 418 U.S. 717 (1974), Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), and the other cases cited by petitioners were met in this instance.

II. The Cause Has Been Remanded to the District Court for Discovery and Trial, and Review by this Court at this Time in the Absence of a Complete Factual Record Would Be Premature.

The Second Circuit has remanded this case to the district court, and discovery is presently being conducted by all parties. The district court has indicated its intention to schedule the cause for trial at an early date. Among the issues to be considered at trial are questions directly related to the matters raised in the petition, such as the job-relatedness of the examination, the trammeling effect, if any, of normalization upon white candidates, and the propriety of the adjustment of Hispanic candidates' scores. Since the proceedings to date have all been had on summary judgment

after very limited discovery, the present factual record is unusually thin. Under these circumstances, this Court should refrain from reviewing the matter until a complete factual record exists. See, e.g., Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R. Co., 389 U.S. 327, 328 (1967); Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251, 257-58 (1916).

CONCLUSION

As Justice O'Connor has written,

> Title VII's primary goal, of course, is to end discrimination; the victims of job discrimination want jobs, not lawsuits.

Ford Motor Co. v. E.E.O.C., 458 U.S. 219, 230 (1982). The decision of the Second Circuit both recognizes and helps to

effectuate this view. Petitioners have not demonstrated that the decision contravenes established Title VII law. For these reasons, intervenors respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

29 C.F.R. § 1607.4

§ 1607.4 Information on impact.

A. Records concerning impact. Each user should maintain and have available for inspection records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group as set forth in subparagraph B below in order to determine compliance with these guidelines. Where there are large numbers of applicants and procedures are administered frequently,

such information may be retained on a sample basis, provided that the sample is appropriate in terms of the applicant population and adequate in size.

B. Applicable race, sex, and ethnic groups for recordkeeping. The records called for by this section are to be maintained by sex, and the following races and ethnic groups: Blacks (Negroes), American Indians (including Alaskan Natives), Asians (including Pacific Islanders), Hispanic (including persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish origin or culture regardless of race), whites (Caucasians) other than Hispanic, and totals. The

race, sex, and ethnic classifications called for by this section are consistent with the Equal Employment Opportunity Standard Form 100, Employer Information Report EEO-1 series of reports. The user should adopt safeguards to insure that the records required by this paragraph are used for appropriate purposes such as determining adverse impact, or (where required) for developing and monitoring affirmative action progams, and that such records are not used improperly. See sections 4E and 17(4), below.

C. Evaluation of selection rates. The "bottom line." If the information called for by sections 4A and B above shows that the total selection process

for a job has an adverse impact, the individual components of the selection process should be evaluated for adverse impact. If this information shows that the total selection process does not have an adverse impact, the Federal enforcement agencies, in the exercise of their administrative and prosecutorial discretion, in usual circumstances, will not expect a user to evaluate the individual components for adverse impact, or to validate such individual components, and will not take enforcement action based upon adverse impact of any component of that process, including the separate parts of a multipart selection procedure or any separate procedure that is used as an alternative

method of selection. However, in the following circumstances the Federal enforcement agencies will expect a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual components: (1) Where the selection procedure is a significant factor in the continuation of patterns of assignments of incumbent employees caused by prior discriminatory employment practices, (2) where the weight of court decisions or administrative interpretations hold that a specific procedure (such as height or weight requirements or no-arrest records) is not job related in the same or similar circumstances. In unusual circum-

stances, other than those listed in (1) and (2) above, the Federal enforcement agencies may request a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual component.

D. Adverse impact and the "four-fifths rule." A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal

enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group. Where the user's evidence

concerning the impact of a selection procedure indicates adverse impact but is based upon numbers which are too small to be reliable, evidence concerning the impact of the procedure over a longer period of time and/or evidence concerning the impact which the selection procedure had when used in the same manner in similar circumstances elsewhere may be considered in determining adverse impact. Where the user has not maintained data on adverse impact as required by the documentation section of applicable guidelines, the Federal enforcement agencies may draw an inference of adverse impact of the selection process from the failure of the user to maintain such

data, if the user has an underutilization of a group in the job category, as compared to the group's representation in the relevant labor market or, in the case of jobs filled from within, the applicable work force.

E. Consideration of user's equal employment opportunity posture. In carrying out their obligations, the Federal enforcement agencies will consider the general posture of the user with respect to equal employment opportunity for the job or group of jobs in question. Where a user has adopted an affirmative action program, the Federal enforcement agencies will consider the provisions of that program, including the goals and

timetables which the user has adopted and the progress which the user has made in carrying out that program and in meeting the goals and timetables. While such affirmative action programs may in design and execution be race, color, sex, or ethnic conscious, selection procedures under such programs should be based upon the ability or relative ability to do the work.

OMB Control No. 3046-0017. (46 FR 63268, Dec. 31, 1981)

(Pub. L. No. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[43 FR 38295, 38312, Aug. 25, 1978, as amended at 46 FR 63268, Dec. 31, 1981]

No. 84-336 (3)

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IN THE

Supreme Court of the United States

October Term, 1984

JAMES BUSHEY, *et al.*,

Petitioners,

against

NEW YORK STATE CIVIL SERVICE COMMISSION, *et al.*,

Respondents,

GERALD A. WELLS, *et al.*,

Respondents-Intervenors.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counter-Statement of Questions Presented

1. Whether a state agency faced with civil service promotional examination results that have sufficient adverse impact on minority candidates as to be presumptively discriminatory against those candidates, is free under Title VII to adopt voluntary remedial scoring measures before promulgation of the promotional eligibility list.

2. Whether, in light of the Court of Appeals' remand for development of a fuller record and in light of imminent events which will either render the cause moot or substantially alter its procedural posture and substantive significance, this Court should decline to hear this interlocutory request for review.

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No. 84-336

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of the Case

A. Facts

The gravamen of the plaintiffs' claims is that defendant New York State Civil Service Commission ("Civil Service") chose not to employ the raw numerical results of a civil service promotion examination because those results heavily favored white candidates over minority can-

didates. The Court of Appeals for the Second Circuit held that because the raw numerical results had sufficiently adverse impact on black candidates as to be presumptively discriminatory on the basis of race, Civil Service was entitled to score the examination in some race conscious fashion in order to ameliorate the adverse impact of the raw exam results on black candidates. The Court of Appeals did not reach the question of whether the particular race conscious remedy Civil Service chose was appropriate, holding instead that the record was insufficient on that question and remanding for development of "the relevant question under *Weber* [*United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979)] . . . whether in practical terms the plan 'unnecessarily trammel[ed] the interests'" of the plaintiffs. 733 F.2d 220, 228; Petition, pp. 17a-18a,* quoting *Weber*, 443 U.S. at 208.

Civil Service's decision to adjust the raw results of the examination at issue, Correction Captain Examination No. 37-526, occurred after a decade of litigation concerning the racial impact of Civil Service examinations for the positions of Correction Sergeant, Correction Lieutenant and Correction Captain. That litigation history is set forth briefly here.

In 1972, Civil Service administered a written examination for the position of Correction Sergeant. That test was invalidated as discriminatory against racial minori-

* Plaintiffs' "Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit," dated August 30, 1984, including appendices thereto, is cited herein as "Petition, p. ——." The opinions below in this case are cited herein both as they appear in the reports and as they appear in appendices to the Petition.

ties* by the United States District Court for the Southern District of New York in 1974, and Civil Service was directed to develop a new promotional selection device. *Kirkland* v. *New York State Department of Correctional Services*, 374 F. Supp. 1361 (S.D.N.Y. 1974), *aff'd in part and rev'd in part*, 520 F.2d 420 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976) (hereinafter "*Kirkland Sergeants*"). Between 1974 and 1979, Civil Service developed and administered a new Correction Sergeant selection procedure consisting of both a written examination and evaluations of sergeant candidates' performance as Correction Officers.

In development of the new selection procedures, Civil Service found that members of racial minority groups characteristically ranked higher on job performance evaluations than on the carefully prepared "criterion validated" selection procedures, which included a written examination—showing, in short, that the raw written examination scores could not reliably be used as a rank-order predictor of job performance of whites relative to minorities.** Civil Service ameliorated the adverse racial impact by adding 250 points to the scores of minority candidates. White intervenors in the *Kirkland Sergeants* case argued unsuc-

---

* Throughout the litigation history set forth here, as well as in the present litigation, the minority groups at issue have been blacks and hispanics. The Court of Appeals in this case remanded the question whether hispanics were properly included by Civil Service among minorities, along with blacks, as has traditionally been done, or among whites, for purposes of the race conscious scoring device Civil Service employed. Because defendants have not cross-petitioned here, that issue is not presented for this Court's review.

** This general conclusion is supported by a sampling taken during the *Kirkland Lieutenants* litigation (*see* pp. 4-6, *infra*) of performance evaluations of candidates for Correction Lieutenant. There, minority Correction Lieutenant candidates' job performance was found to be statistically indistinguishable from white candidates' performance, even though raw written test results had adverse impact against minority lieutenant candidates.

cessfully that this score adjustment was a racial quota or otherwise illegal. *Kirkland Sergeants,* 482 F. Supp. 1179 (S.D.N.Y.), *aff'd,* 628 F.2d 796 (2d Cir. 1980), *cert. denied,* 450 U.S. 980 (1981).

In light of the fact that successful candidates for Correction Sergeant comprise the candidate pool for Correction Lieutenant promotions, and ultimately for Correction Captain positions, Civil Service did not administer any Correction Lieutenant or Captain examinations during the pendency and implementation of *Kirkland Sergeants.* Nonetheless, employees of the New York State Department of Correctional Services (hereinafter "DOCS") obtained an order that under New York State law such examinations had to be administered forthwith. *Edgerton* v. *New York State Civil Service Commission,* 84 A.D.2d 881, 444 N.Y.S.2d 731 (3d Dep't 1981).

In light of the limited time allowed by the *Edgerton* order, Civil Service was unable either to consider alternatives to selection procedures solely based on written examinations, or to do the kind of criterion validation study done for the Correction Sergeants examination. Therefore, the Correction Lieutenant examination, administered on October 3, 1981, consisted solely of 60 written questions, and the Correction Captain examination (which was Examination No. 37-526, here at issue), administered on January 30, 1982, consisted solely of 103 written questions. Both of these written examinations yielded raw results with adverse impact on minority candidates. The Correction Lieutenant eligible list promulgated in December 1981 was challenged by lawsuit commenced on January 15, 1982

by a group of black and hispanic Correction Lieutenant candidates. *Kirkland* v. *New York State Department of Correctional Services,* 552 F. Supp. 667 (S.D.N.Y. 1982), *aff'd,* 711 F.2d 1117 (2d Cir. 1983), *cert. denied,* —— U.S. ——, 104 S. Ct. 997 (1984) (hereinafter "*Kirkland Lieutenants*"). By that lawsuit, the black and hispanic lieutenant candidates contended not only that the Correction Lieutenant examination results were discriminatory but that the use of those results for Correction Lieutenant selection would inevitably bias the Correction Captain examination against minorities by precluding minorities from adequate representation in the Correction Captain candidate pool.

The parties to *Kirkland Lieutenants* began negotiations toward settlement, and an agreement was reached in August, 1982 and submitted to the United States District Court for the Southern District of New York for approval. Under that settlement, the contested Correction Lieutenant examination would be used for appointments to Correction Lieutenant positions, but the raw results would be adjusted by use of a zone scoring system. Appointments from within each zone were to be made to candidates such that the proportion of minority appointments approximated the proportion of minority candidates in the eligible pool.

The *Kirkland Lieutenants* settlement further required that a new Correction Captain examination be given on a specified timetable, and that when that examination yielded an eligible list, that list would supersede any prior Correction Captain eligible list, including the list here at issue,

Eligible List No. 37-526. Finally, the *Kirkland Lieutenants* settlement provided that if the new Correction Captain examination yielded raw results with adverse racial impact, Civil Service

> "... shall consider application of one or more of the following techniques to minimize or eliminate adverse impact on minority candidates:
>
> i. Separate frequency distribution . . .;
>
> ii. Elimination of particular items [*i.e.*, examination questions] . . .;
>
> iii. Addition of items to off-set the adverse impact of other items."

Over the objections of white intervenors, the settlement was approved by the District Court by order dated November 9, 1982. The Court of Appeals affirmed and this Court denied the intervenors' petition for a writ of certiorari.

When Correction Captain Examination No. 37-526 was scored, the raw results were determined to have egregious adverse impact on minorities, well beyond the limits of the four-fifths rule,* and thus to be presumptively discriminatory. Rather than promulgate a presumptively discriminatory eligible list, in light of developing case law approving race conscious adjustments to presumptively discriminatory raw results, and in light of the failure to that point of attempted defenses in the Second Circuit of promotional or employment examination results which

* Equal Economic Opportunity Commission Uniform Guidelines on Employee Selection, 29 C.F.R. § 1607.4(D), cited herein as the "four-fifths rule".

violated the four-fifths rule, Civil Service decided that some race conscious remedy was appropriate.*

Civil Service opted to use a separate frequency distribution, a standard elementary statistical device. The separate frequency distribution device, in short, separates the white candidates' scores and the minority candidates' scores, and "normalizes" them, which renders identical the means and standard deviations** of the two groups. The two normalized groups are then recombined into a single eligible list. The result is a list which treats candidates of all races equally. This technique is consistent with the four-fifths rule's presumption of discrimination, and with the finding that the racial differential in performance in DOCS promotional selection procedures, especially on written examinations, is not reflected by any similar racial differential in performance in DOCS employment. The separate frequency distribution scoring device is designed to remove only that score variation

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* The decision to make *some* race-conscious adjustment and the selection of separate frequency distributions as the particular adjustment, were distinct decisions both chronologically and substantively. The record on appeal contains little factual evidence pertaining to the selection of separate frequency distributions as the appropriate device, and thus the Court of Appeals remanded that question.

** A statistical mean is simply an arithmetic average—here, the normalization technique adjusts the white and minority means so that they are equal.

A standard deviation is a measure of "spread" or "variance" of a group of numbers. Here, the normalization process guarantees that the percentage of white candidates falling within any given point spread from the white candidates' mean, equals the percentage of minority candidates falling within that same point spread of the minority candidates' mean. In lay terms, the separate frequency distribution shapes the white candidates' scores into a bell curve, and shapes the minority candidates' scores into a bell curve, such that the bell curves' means are concurrent in width, then recombines the two bell curves into one.

presumptively attributable to the disparity between job performance and examination performance.*

The adjusted results of Examination No. 37-526 were promulgated as Eligible List No. 37-526 on September 9, 1982. This lawsuit was commenced on November 2, 1982 by fifteen white captain candidates who sought a preliminary injunction against appointments from Eligible List No. 37-526. By Stipulation and Order signed by the parties and approved by the United States District Court for the Northern District of New York on November 2, 1982, defendants consented to a stay against permanent Correction Captain appointments from Eligible List No. 37-526 pending further order. Having joined this litigation after the stay was agreed to and so ordered (but before the summary judgment motions and appeal here on review), the intervenors in this case moved before Judge Miner on October 5, 1984, to have the stay vacated. Judge Miner denied the motion, and therefore the Stipulation and Order precluding permanent appointments remains in effect, and approximately 55 Correction Captain positions have become available for permanent appointments.

During pendency of this litigation, the preparation, administration and scoring of the new Correction Captain examination mandated by the *Kirkland Lieutenants* settlement has continued apace. The written portion of the

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* As the Court of Appeals held, the separate frequency "did not displace any nonminority candidates from the eligible list . . . , did not place an absolute bar to the advancement of nonminority candidates, . . . was only temporary in nature[, and] . . . was tailored narrowly to eliminate the adverse impact of the test." 733 F.2d at 228, Petition, p. 18a. The Court of Appeals went on to hold that these facts alone do not satisfy the *Weber* question of whether plaintiffs' rights were "unnecessarily trammeled."

examination was administered on December 10, 1983, and the oral portion was administered early in 1984. Consultations between Civil Service and the expert hired pursuant to the *Kirkland Lieutenants* settlement continued through the summer, and on September 20, 1984, Civil Service received a recommendation from the expert as to how the examination should be scored. Civil Service expects to be able to promulgate a new Correction Captain eligible list within the next month.

As set forth *infra*, pp. 19-22, promulgation of the new eligible list will render moot plaintiffs' claims here.

B. The Proceedings Below

The complaint herein alleged violations of the Fourteenth Amendment to the United States Constitution, via 42 U.S.C. § 1983; 42 U.S.C. § 1981; Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.* and 2000e *et seq.;* and various provisions of New York State law. Plaintiffs' motion for summary judgment sought judgment "on all causes of action for the relief sought in plaintiffs' complaint . . . ." Defendants' motion for summary judgment sought judgment against plaintiffs on all causes of action, including a judgment that thirteen of the fifteen plaintiffs lacked standing to sue.

The District Judge specifically held that no plaintiff had a cause of action under 42 U.S.C. § 1981 or § 1983, under the Fourteenth Amendment, or under Title VI. 571 F. Supp. at 1566-67, n.9; Petition, pp. 26b-28b, n.9. Further, the District Judge held that no plaintiff was entitled to any award of back pay. 571 F. Supp. at 1580-81; Peti-

tion, pp. 80b-81b.* Thus, the District Court's holding for plaintiffs was squarely and expressly limited to their Title VII claims. 571 F. Supp. at 1566-67; Petition, pp. 25b-26b. Finally, the District Judge granted defendants' motion to the extent that he held that plaintiffs Sweeney and Clark lacked standing to sue. 571 F. Supp. at 1580; Petition, 77b-78b.

The defendants and the intervenors appealed the decision of the District Court, but no plaintiff appealed. The Court of Appeals addressed only Title VII questions. *See* 733 F.2d at 222, 223, n.4; Petition, pp. 4a, 7a, n.4.**

The Court of Appeals held that a *prima facie* case of adverse racial impact could be shown here by resort to the four-fifths rule, among other methods, and that under Title VII a *prima facie* case of adverse impact was a sufficient predicate for voluntary, race conscious remedial action. The Court of Appeals did not approve the use here of a separate frequency distribution, as repeatedly implied by petitioners, but in fact only reversed the District Court's

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* The District Judge apparently merely declined to rule on plaintiffs' various claims under New York State law, although his citation to *Jong-Yul Lim* v. *International Institution of Metropolitan Detroit, Inc.*, 510 F. Supp. 722, 725 (E.D. Mich. 1981), suggests that he believed those claims to be beyond his subject matter jurisdiction. In any event, the subsequent decision of this Court in *Pennhurst State School and Hospital* v. *Halderman*, —— U.S. ——, 104 S. Ct. 900 (1984), makes plain that the federal judiciary lacks subject matter jurisdiction to compel state officials to comply with state law, and the Court of Appeals so held here. 733 F.2d at 223, n.4; Petition, p. 7a, n.4.

** Therefore, contrary to the repeated implications of the Petition, questions arising out of the Fourteenth Amendment, 42 U.S.C. §§ 1981 and 1983, and Title VI are not properly before this Court. Furthermore, the dismissal of plaintiffs Sweeny and Clark is not properly before this Court.

holding that the methodology was "fundamentally flawed" and remanded for proceedings on the question whether use of the separate frequency distribution device "unnecessarily trammeled" the rights of the plaintiffs.

Since the Court of Appeals declined to rule on the propriety of the separate frequency distribution used here, and since neither defendants nor intervenors presently seek review of that declination, the decision here of the Court of Appeals, with one exception, is utterly indistinguishable from the decision of the same Court of Appeals in *Kirkland Lieutenants, supra,* 711 F.2d 1117 (2d Cir. 1983), *cert. denied,* —— U.S. ——, 104 S. Ct. 997 (1984). The sole distinction, upon which ultimately plaintiffs base their entire case and their present petition, is that the *Kirkland Lieutenants* race conscious adjustment to presumptively discriminatory raw scores was performed pursuant to negotiated settlement of a lawsuit, whereas the race conscious adjustment to presumptively discriminatory raw scores here was performed by Civil Service without waiting to be sued.*

Defendants submit that case law, policy and pragmatism compel the rejection of the rule proposed by plaintiffs. It

* Plaintiffs' repeated insinuations that Civil Service somehow sought to conceal the fact or method of the adjustment here are ludicrous. The adjustment methodology was not approved by Civil Service until September 1, 1982, and Eligible List No. 37-526 was promulgated on September 9, 1982. Immediately upon promulgation, the scoring methodology became a matter of public record, and was in fact reviewed by a number of candidates. Obviously, given plaintiffs' extensive complaint dated November 2, 1982, plaintiffs had no difficulty obtaining the information they needed.

As to plaintiffs' statement that the examination itself has improperly been withheld by Civil Service, it is sufficient to note that on remand, Judge Miner has sustained Civil Service's objection that the examination itself is not relevant to any material issue in the case.

is absurd to proclaim that an employer must implement a presumptively discriminatory employment selection device and wait to be sued before Title VII will countenance any remedy addressed to the presumed discrimination.

Reasons for Denying the Writ

I

The Court of Appeals' Decision That, Given Presumptively Discriminatory Civil Service Examination Results, a Civil Service Department Is Free Under Title VII to Remedy That Presumptive Discrimination Voluntarily, Accords With Policy and Established Case Law Under Title VII, Including the Strong Preference for Voluntary Compliance With Title VII.

The Court of Appeals' opinion states three holdings under Title VII. First, a *prima facie* showing of adverse impact on minority candidates for promotion can be made by a statistical demonstration that the pass rate of minorities on the promotional examination was less than four-fifths of the pass rate of white candidates. Here the minorities' pass rate was 25%, while 49% of the white candidates passed.

Second, in light of such egregious *prima facie* adverse impact, a state agency is free under Title VII to adopt some race conscious remedial measure. In other words, the adoption of a race conscious remedy does not require the state agency to inquire whether the *prima facie* case can be

rebutted,* nor does it require the state agency to wait to be sued and adopt the remedial measure pursuant to settlement or court order.

Third, the Court of Appeals held that the record insufficiently illuminated the choice of the particular race conscious remedy, and remanded the question for further proceedings.

The first holding is a settled proposition of Title VII law. It is plain enough that egregious statistical disparity gives rise to a presumption of racial discrimination. *E.g., Connecticut* v. *Teal,* 457 U.S. 440, 443 and n.4, 445-51 (1982) (violation of four-fifths rule, and significantly lower mean test score for minority candidates); *New York City Transit Authority* v. *Beazer,* 440 U.S. 568, 584-87 (1979) ("prima

* One generally accepted means of rebuttal in a litigation context is a showing that the contested selection device is "job related." *See, e.g., Guardians Association* v. *Civil Service Commission,* 630 F.2d 79 (2d Cir. 1980), *cert. denied,* 452 U.S. 940 (1981). Plaintiffs have throughout this litigation wrongly contended that defendants concede that Examination No. 37-526 was "job related." *See, e.g.,* Petition, pp. 4, 8, 11, 14, 16 and n.5. The admission supposedly quoted on page four of the Petition is in fact a paraphrase from plaintiffs' complaint, not a quote from defendants' answer. Defendants' answer states, in pertinent part: "[T]he selection procedure developed to select Correction Captains, which included use of Examination No. 37-526, is a valid selection procedure under Title VII and does measure the merit and fitness of candidates. . . ." The term "selection procedure" refers to the examination *as scored by use of the separate frequency distribution device,* not the examination alone. Defendants have always contended that the entire selection procedure at issue was job related, but have never conceded that the examination alone (*i.e.,* the candidates' raw scores) were sufficiently job related under Title VII to allow use of the raw scores as a promotional ranking device.

facie violation of [Title VII] may be established by statistical evidence. . . .").*

It is equally uncontroversial that remedial action can be undertaken, by settlement or by court order, upon such a showing of adverse racial impact. *E.g., Texas Department of Community Affairs* v. *Burdine,* 450 U.S. 248, 254 (1981) ("[i]f the trier of fact believes the plaintiff's evidence [*i.e.,* to prove a *prima facie* case], and if the employer is silent in the face of the presumption [of discrimination], the court must enter judgment for the plaintiff"); *Kirkland Lieutenants,* 711 F.2d at 1129-31 ("showing of a prima facie case of employment discrimination through a statistical demonstration of disproportionate racial impact constitutes a sufficiently serious claim of discrimination to serve as a predicate for a voluntary compromise containing race-conscious remedies"); *Stotts* v. *Memphis Fire Department,* 679 F.2d at 552-53 and n.10 (identifiable statistical disparity must exist before a decree may embody affirmative relief provisions"); *Guardians Association* v. *Civil Service,* 630 F.2d at 106 (absence of rebuttal of *prima facie* case based

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* *See also, Dothard* v. *Rawlinson,* 433 U.S. 321, 329-30 and n.12 (1977) (height and weight requirements met by 99.76% of men in Alabama, but only 58.87% of women in Alabama); *Kirkland Lieutenants,* 711 F.2d at 1130-31 ("statistical showing of adverse impact creates a 'presumption of Title VII discrimination'"); *Stotts* v. *Memphis Fire Department,* 679 F.2d 541, 552-53 and n.10 (6th Cir. 1982), *rev'd on other grounds,* —— U.S. ——, 104 S. Ct. 2576 (1984); *Setser* v. *Novack Investment Co.,* 657 F.2d 962, 968 (8th Cir. 1981) ("showing of conspicuous racial imbalance by statistics is sufficient"); *Guardians Association* v. *Civil Service Commission of the City of New York,* 630 F.2d at 88; *United States* v. *City of Alexandria,* 614 F.2d 1358, 1364 (5th Cir. 1980) ("[t]o make out a prima facie case of pattern or practice of discrimination in violation of Title VII, all that a private or government plaintiff need show initially is that there is a significant statistical disparity between the racial . . . composition of an employer's work force and that of the community from which the workers are hired").

on "significant disparate racial impact" shows violation of Title VII); *United States* v. *City of Alexandria*, 614 F.2d at 1364-66 (same).

Plaintiffs apparently recognize that these propositions are not easily assailable, and therefore they argue for a distinction between a remedy undertaken pursuant to settlement or judgment, and the very same remedy undertaken voluntarily. This distinction would violate Title VII's preference for voluntary action, *see, e.g., United Steelworkers* v. *Weber*, 443 U.S. at 200-08 ("[t]he very statutory words intended as a spur or catalyst to cause 'employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history' [citation omitted]," do not constitute a "legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy"); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) ("[c]ooperation and voluntary compliance were selected as the preferred means for achieving [the goals of Title VII]. . . . In the Equal Employment Opportunity Act of 1972 . . . , Congress amended Title VII . . . to promote voluntary compliance with the requirements of Title VII").*

* Contrary to plaintiffs' contentions here, the policy favoring compliance with Title VII is not limited to plans produced by negotiations, or to plans produced by any sort of adversary process. *See*, Petition, pp. i, 13, 20. The legislative purposes of Title VII, *see, e.g., United Steelworkers* v. *Weber*, 443 U.S. at 202-04, have nowhere been held to depend on negotiations or other adversary context. Plaintiffs' suggestion, ironic at best, is that a race-conscious remedy that is wholly voluntarily adopted, as here, is less favorable to whites such as plaintiffs than one negotiated under pressure of actual or threatened federal court action by minority candidates.

In addition, plaintiffs' rule would lead to impractical, inefficient and unfair results. Plaintiffs' rule would have required defendants to issue an eligible list based solely on raw scores that are presumptively discriminatory against minority candidates, and to begin making appointments from that list. If no suit were filed, the presumptively discriminatory list would be used for its full term. But the day a suit is filed the defendants could concede the litigation, stipulate to a race conscious remedy and implement it, even displacing appointees promoted from the presumptively discriminatory list. Or, the defendant could litigate the case, and, at trial, "choose to present no evidence" to rebut the *prima facie* case, *United States* v. *City of Alexandria,* 614 F.2d at 1364, obligating the trial court to enter judgment for plaintiff.*

To state the proposition is to betray its impracticality. The considered judgment of a state agency** is no less appropriate or valid under Title VII because it precedes rather than follows the filing of a lawsuit. Race conscious remedies are common in hiring, both by private employers, *e.g., United Steelworkers* v. *Weber,* 443 U.S. at 197, 208-09 (interim requirement that 50% hired be black), and by public employers using examinations. *See, e.g., Connecticut* v. *Teal,* 457 U.S. at 443 and n.4, *aff'g* 645 F.2d 133 (2d Cir.

* Thus, the presence of litigation in no way guarantees that a race conscious remedy will be thoroughly debated. The policies behind Title VII's preference for voluntary solutions have nothing to do with adversariness, as plaintiffs argue, and in fact, those policies are *best* served when a remedy is resorted to without any litigation at all. *See Kirkland Lieutenants,* 711 F.2d at 1128, n.14.

** Plaintiffs suppose that defendants' voluntary remedial action was "left to the unreviewed discretion of middle level state bureaucrats." Petition, p. 20. In fact, of course, the action was reviewed by the general counsel to Civil Service, by the president of Civil Service, and by the chain of command leading down from the president and from the general counsel.

1981) (pass point reduced five points "in an attempt to lessen the disparate impact of the examination").* Research reveals no case which requires that an employer demonstrate that it cannot rebut the presumption of racial discrimination before adopting a voluntary, race conscious remedy.

II

The Procedural Posture of This Case Militates Against the Interlocutory Review Sought by Plaintiffs.

A. The Court of Appeals Remanded the Case for Development of a Fuller Record on the Only Novel Question This Case Presents.

Having decided that "a statistical demonstration of disproportionate racial impact constitutes a sufficiently serious claim of discrimination to serve as a predicate for employer-initiated, voluntary race-conscious remedies," 733 F.2d at 228; Petition, pp. 16a-17a (footnotes omitted), the Court of Appeals then faced the only novel question before it: whether Civil Service's choice of the separate

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* *See also Kirkland Lieutenants,* 711 F.2d at 1133-35 (zone scoring, and minority appointment ratio equal to percentage of minorities in applicant pool); *Stotts* v. *Memphis Fire Department,* 679 F.2d 579 (6th Cir.), *cert. denied,* 459 U.S. 969 (1982) (hiring and promotion "goals"); *Guardians Association* v. *Civil Service,* 630 F.2d at 106-08 and n.24 (interim requirement that 50% of candidates hired be minorities); *Culbreath* v. *Dukakis,* 630 F.2d 15, 19-20 (1st Cir. 1980) (various affirmative practices, including annual and long-term minority hiring ratios); *Kirkland Sergeants,* 628 F.2d at 798-99 (examination results re-scored by adding 250 points to raw scores of each minority applicant); *United States* v. *City of Alexandria,* 614 F.2d at 1362 (interim hiring ratios for minorities); *Williams* v. *City of New Orleans,* 543 F. Supp. 662, 682-83 (E.D. La. 1982), *aff'd,* 729 F.2d 1554 (5th Cir. 1984) (*en banc*) (separate frequency distributions for whites and minorities must be considered on future exams if raw results show adverse impact).

frequency distribution scoring device as the particular race conscious remedy to be applied here was permissible under Title VII. The Court of Appeals reversed the District Court's holding that the methodology selected was "fundamentally flawed" (733 F.2d at 224, 228; Petition, pp. 9a, 17a; quoting 571 F. Supp. at 1576; Petition, p. 64b), and held that the "revelant question" is "whether in practical terms the plan 'unnecessarily trammel[ed] the interests' of the nonminority employees." 733 F.2d at 228; Petition, pp. 17a-18a; quoting *United Steelworkers* v. *Weber,* 443 U.S. at 208. The Court of Appeals held that "the record is insufficient to determine" that question, and that therefore remand was necessary "for a full exploration of this disputed issue" of fact. 733 F.2d at 229; Petition, pp. 18a-19a.

The interlocutory nature of this Petition for review "of itself furnishe[s] sufficient ground for the denial" of the Petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.,* 240 U.S. 251, 258 (1916). *See also Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R. Co.,* 389 U.S. 327, 328 (1967); *American Construction Co.* v. *Jacksonville, T. & K. R. Co.,* 148 U.S. 372, 384 (1893); *Maryland* v. *Baltimore Radio Show, Inc.,* 338 U.S. 912, 918 (1950).

Review of the separate frequency distribution scoring device is not ripe not only because of the procedural posture of this litigation, but also as a matter of substantive law. Research reveals only one other reported decision dealing with the propriety of the separate frequency distribution methodology, and there the methodology was not a central issue. *Williams* v. *City of New Orleans,* 543 F. Supp. at 682-83. Therefore, it is "desirable" that this

Court defer review of this issue until "further illumined by the lower courts. Wise adjudication has its own time for ripening." *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. at 918.

B. Imminent Events Will Render Wholly or Largely Moot the Issues Presented by This Interlocutory Review.

Defendants expect to promulgate a new Correction Captain eligible list, as required by the settlement of *Kirkland Lieutenants,* within as little as a few weeks of the date of this brief. The *Kirkland Lieutenants* settlement was negotiated and drafted with the intention of all parties that the resulting eligible list would upon its promulgation supersede Eligible List No. 37-526, at issue here.

That plain intention of the *Kirkland Lieutenants* settlement was frequently restated during this litigation. As it began to appear likely that the stay against appointments from Eligible List No. 37-526 would remain in effect until the time the new eligible list is promulgated, defendants here repeatedly advised the parties both here and in *Kirkland Lieutenants* that the results of the examination here at issue (whether in the form of Eligible List No. 37-526 or in the form of some altered eligible list as sought by plaintiffs here) will be scrapped completely once the new list issues. Presumably motivated by this advice, intervenors here moved on October 5, 1984 to have the stay against appointments from Eligible List No. 37-526 lifted. That motion was denied without opinion by the District Court.

Defendants submit that promulgation of the new eligible list will render this litigation moot for two reasons.

First, there is no federal right—in particular, no Title VII right—to compel use of Eligible List No. 37-526, or of any other scoring of Correction Captain examination 37-526.* Plaintiffs' only federal right is to preclude *use* of an eligible list that discriminates against them because of their race. As to this right here, if any, plaintiffs' claim necessarily depends on defendants' actual or intended use of Eligible List No. 37-526. Obviously, if the stay against appointments from Eligible List No. 37-526 remains effective until that list is superseded, then no actual use of Eligible List No. 37-526 will have occurred, and no intention to use the list will any longer exist. In short, no plaintiff will have any federal claim.

Second, even if promulgation of the new list did not *per se* render moot this litigation, the actual operation of the new list will demonstrate the lack of standing of all or most of the remaining 13 plaintiffs. The District Judge here, although he granted defendants' motion to dismiss plaintiffs Clark and Sweeney for lack of standing to sue, denied the motion as to other plaintiffs because at that point "it [could] not be said as a matter of law that they would not suffer from the rescoring. While their low rankings make promotion appear unlikely, it is not at all certain that no promotion remains possible." 571 F. Supp. at 1579; Petition, p. 78b. When the new list issues, it will then be certain what the maximum number of appointments

* Plaintiffs have from time-to-time asserted state law rights. *E.g.*, Petition, pp. 3, 11 and 17. Such claims cannot be heard in federal court. *See Pennhurst State School and Hospital* v. *Halderman*, 104 S. Ct. 900.

would have been from the results of Examination 37-526, had appointments not been stayed. In fact, it now appears that the examination at issue could not have been used for more than approximately 55 appointments, had appointments not been stayed. Therefore, a number of plaintiffs who passed the examination with relatively low scores will presumably face proof "as a matter of law that they would not suffer from the rescoring." *Id.* In addition, an as yet uncertain number of plaintiffs here will presumably receive offers of appointment from the new eligible list, many of them within the next few weeks, thereby mooting their injunctive and declaratory claims.* Therefore, it is quite possible that events in the next few weeks will render moot the claims of all of the plaintiffs.

Even probable or potential mootness is a sound basis for this Court to deny a writ of certiorari. *See, e.g., De Funis* v. *Odegaard*, 416 U.S. 312 (1974). That is especially so where the decision appealed from is a remand for further proceedings. It is true that both mootness and standing relate to the existence of an Article III "case or controversy," and therefore can be litigated *de novo* in this Court. However, where the justiciability of a cause turns on potentially complicated individualized factual issues, the wisest use of this Court's resources dictates allowing the trial court to develop the pertinent facts and review the applicable law of mootness and standing. The utility of this course is perhaps maximized where, as here, proceedings on remand to the District Court have continued during the briefing of this appeal, and, in fact, timing of those proceedings on remand could conceivably impel de-

* The District Court has already denied all plaintiffs' monetary claims, and that denial was not appealed.

fendants to raise mootness and standing issues by motion in the District Court before this Petition is decided.

Finally, this case is not one of the narrow category of those which are heard despite technical mootness because they are "capable of repetition yet evading review." *Dunn* v. *Blumstein*, 405 U.S. 330, 333 n.2 (1972). *See, e.g., Roe* v. *Wade*, 410 U.S. 113, 125 (1973). Any doubt in that regard is erased by the fact that the new eligible list is being scored without the use of the separate frequency distribution device. In addition, the new list will presumably be used for the four-year maximum provided by state law, unlike Eligible List No. 37-526, the useful life of which was sharply limited by the *Kirkland Lieutenants* settlement.

Conclusion

The Petition for a Writ of Certiorari Should Be Denied.

Dated: New York, New York
October 30, 1984

Respectfully submitted,

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(4)

SUPREME COURT OF THE UNITED STATES

JAMES BUSHEY ET AL. *v.* NEW YORK STATE CIVIL SERVICE COMMISSION ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 84–336. Decided January 7, 1985

The petition for a writ of certiorari is denied.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE WHITE join, dissenting from denial of certiorari.

In *United Steelworkers* v. *Weber*, 443 U. S. 193 (1979), this Court held that a private employer does not violate Title VII of the 1964 Civil Rights Act when it voluntarily undertakes "affirmative action," as long as that action is taken "to eliminate conspicuous racial imbalance in traditionally segregated job categories." *Id.*, at 209. But the *Weber* Court began its analysis by stating:

> "We emphasize at the outset the narrowness of our inquiry. Since the Kaiser-USWA plan does not involve state action, this case does not present an alleged violation of the Equal Protection Clause of the Fourteenth Amendment." *Id.*, at 200.

I belive that this case squarely prevents the question left open in *Weber*.

The controversy here centers on a written examination required of all applicants seeking the position of "Correction Captain" in the New York State prison correctional system. The exam results are combined with credit for seniority and armed forces service to arrive at a ranking list, which list is used to fill positions as they become open. The specific test in issue was administered to 275 candidates on January 30, 1982. Thirty-two of these were minority candidates, and 243 were nonminority. The test was an objective test consisting of 103 questions. Of the minority candidates, 8, or 25%, passed the examination by scoring 70% or higher. Forty-eight percent of the nonminorities passed.

The State reviewed these results in light of a rule of the Equal Employment Opportunity Commission, which states that evidence that an employer selects minority candidates for employment positions at a rate that is less than 80% of the selection rate for nonminorities "will generally be regarded . . . as evidence of adverse impact," see 29 CFR § 1607.4(D). It concluded that the test's minority selection rate of approximately 50% demonstrated an adverse impact on minority candidates. Given this statistical disparity, the fact that the State had been sued by minorities with respect to two prior examinations for correctional officer positions,[1] and the lack of any indication that minorities would not perform equally well in the position of Correction Captain, the State unilaterally decided to raise the scores of minority candidates by establishing a separate normalization curve for minority candidates and equating the mean of that curve with the mean for nonminorities. The upshot of this action was that 8 more minority candidates passed the test; although no nonminority candidates were taken off the list the scores of all minority candidates were increased, and the highest scoring minority candidate became the highest scoring of all the candidates.

Petitioners are several nonminority candidates who claim they were injured by the State's action because they were "bumped" down the ranking list by minority candidates whose scores were increased. They brought suit claiming that the State's unilateral adoption of race-conscious employment policies violated Title VII and the Fourteenth Amendment. The District Court agreed that the State's action violated Title VII[2] for three reasons: first, it did not believe

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[1] See *Kirkland* v. *New York State Dept. of Correctional Services*, 711 F. 2d 1117 (CA2 1983), cert. denied, —— U. S. —— (1984) (*Kirkland Lieutenants*); *Kirkland* v. *New York State Dept. of Correctional Services*, 520 F. 2d 420 (CA2 1975), cert. denied, 429 U. S. 823 (1976), on remand, 628 F. 2d 796 (CA2 1980), cert. denied, 450 U. S. 980 (1981) (*Kirkland Sergeants*).

[2] The court dismissed petitioners' claim under 42 U. S. C. § 1983, and that decision was not appealed.

that the evidence supplied by the State established a *prima facie* case of discrimination; second, it did not believe in any event that the State could take race-conscious action when it had not attempted or considered rebutting a *prima facie* case with proof that the employment decisions were based on legitimate job related criteria—in this case a professionally developed job related examination; and third, it thought the remedy adopted by the State was "fundamentally flawed."

The Court of Appeals for the Second Circuit reversed. *Bushey* v. *New York State Civil Service Commission*, 733 F. 2d 220 (CA2 1984). It held that the State had properly determined that a *prima facie* case was made out by reference the the EEOC guidelines. It then reasoned that the State was not required to rebut this case before taking the affirmative race-conscious steps taken here. The court suggested that the District Court's analysis was contrary to Title VII's policy favoring voluntary compliance because it only permitted the State to take race-conscious actions after there had been a judicial determination that the Act had been violated. Such a rule would actually promote litigation, and would only result in the State waiting to be sued and then settling. The court relied on its prior opinion in *Kirkland* v. *New York State Dept. of Correctional Services*, 711 F. 2d 1117 (CA2 1983), cert. denied, —— U. S. —— (1984), in which it had approved a settlement with respect to the results of the written examination for Correction Lieutenant. The court also relied on *Weber*, *supra*, noting that in *Weber* this Court had approved voluntary affirmative action even in the absence of a determination that the employer had discriminated. In a footnote, the opinion refused to distinguish *Weber* on the ground that this case involved a public employer. *Bushey*, 733 F. 2d, *supra*, at 227, n. 8. Finally, the court rejected the District Court's characterization of the "remedy" as "fundamentally flawed," noting that the score adjustment did not displace nonminority candidates from the list or bar their advancement. It nevertheless remanded the case for deter-

mination of whether the remedy "unnecessarily trammel[ed] the interests" of nonminority employees, as that standard was set in *Weber*.

I believe that the Court of Appeals' opinion reaches questionable conclusions on difficult and important questions, and that certiorari should therefore be granted. Principal among these decisions is the court's unexplained extension of *Weber* to allow voluntary affirmative action by State employers. This Court has never taken the position that, consistent with the restraints of the Fourteenth Amendment, a State agency may establish preferential classifications on the basis of race in the absence of rulings by an appropriate body that constitutional or statutory violations have occurred. See *University of California Regents* v. *Bakke*, 438 U. S. 265, 302–310 (1978) (opinion of JUSTICE POWELL). Cf. *Memphis Fire Dept.* v. *Stotts*, —— U. S. ——, —— (1984) (again reserving the question of a public employer's ability to adopt voluntary affirmative action plans).[3] Certainly the express reservation of the question in *Weber* suggests that a public employer may fare differently in this regard from a private employer, and no decision of this Court subsequent to *Weber* holds that it is consistent with the Fourteenth Amendment for a State agency unilaterally to decide to use race-based criteria to favor minorities in employment decisions. The States are not granted the enforcement power under § 5 of the Fourteenth Amendment that many members of this Court found important in upholding the Congressional Act in *Fullilove* v. *Klutznick*, 448 U. S. 448, 472 (1980) (opinion of THE CHIEF JUSTICE); 448 U. S. at 500 (POWELL, J., concurring). Nor is there even a hint in the opinions below that the State Correction Department has violated the Fourteenth Amendment, either in utilizing this particular test or other-

[3]That this question is both important and unsettled is reflected in the several diverse opinions of the judges of the Court of Appeals for the Fifth Circuit, sitting en banc in *Williams* v. *City of New Orleans*, 729 F. 2d 1554 (CA5 1984) (en banc).

wise, by purposefully discriminating against minority employees. The test itself has been deemed irrelevant to this litigation. All that has happened here is that the State has perceived a statistical disparity in the test results of minority and nonminority applicants, and, at least in part because it fears a lawsuit by minority applicants, it has chosen to do away with that disparity by discriminating against similarly situated nonminority applicants.

I find unpersuasive the Court of Appeals' argument that requiring a judicial determination of discrimination in these cases will undermine Title VII's policy favoring voluntary compliance. Although voluntary compliance is a laudable goal, members of this Court have recognized on other occasions that "affirmative action" plans must be policed to prevent the practice of discrimination for discrimination's sake, see *Bakke*, *supra*, 438 U. S. at 307–310 (opinion of JUSTICE POWELL); cf. *Fullilove*, *supra*, 448 U. S. at 480 (opinion of THE CHIEF JUSTICE); and to protect the interests of innocent third parties, see *Weber*, *supra*, 443 U. S. at 208–209. These interests will not be sufficiently protected if agencies charged with discrimination may simply cave in to the allegations without even considering justifications for, or attempting to justify, their original employment decisions, particularly where the allegations are based only upon disparate impact. I therefore disagree with the Court of Appeals' suggestion that it would in any event be sufficient for the State to wait until it is sued and then settle; in these situations the State employer is in a difficult position; it has a duty to act nondiscriminatorily toward both minority and nonminority applicants and its employment decisions must be justified to both sides. States should not be allowed to practice racial discrimination anew under the guise of atoning for past discrimination or because of the difficulties with mounting an otherwise legitimate defense to a lawsuit.

Thus, even if it were clear that state agencies may engage in this sort of "affirmative action" in the absence of a finding

of discrimination, review here is still warranted to address the circumstances under which this type of "affirmative action" would be permissible.

Petitioners did not press their Fourteenth Amendment claim on appeal, and it may be that the Court sees this fact as an adequate basis for denying certiorari. But I do not think that review of these issues is thereby foreclosed. Petitioners may be precluded from arguing directly that the state action here violated the Fourteenth Amendment, but I think that when a state employer claims that arguably discriminatory conduct on its part is nonetheless authorized by Title VII, the claim of such statutory authorization must be considered in the light of the prohibitions of the Fourteenth Amendment. I doubt that when Congress amended Title VII in 1972 to bring state agencies within its mandate it intended to allow those agencies to claim that their actions were shielded under Title VII even if the actions would violate the Fourteenth Amendment. The issue is one of statutory construction, but as always the statute must be read with the presumption that Congress did not intend to authorize conduct that is prohibited by the Constitution. See *NLRB* v. *Catholic Bishops of Chicago*, 440 U. S. 490, 500–501 (1979).

I think this Court should grant certiorari in this case to decide the question left open in *Weber*, and to address the other difficult questions presented by the decision of the Court of Appeals.